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CASE NO.

in the Supreme Court of the United States

October Term, 1987

H.K. PORTER COMPANY, INC.,

Petitioner,

vs.

METROPOLITAN DADE COUNTY, FLORIDA, and JOHN A. DYER, individually and as contracting officer for Metropolitan Dade County, Florida,

Respondent.

APPENDIX

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EDITOR'S NOTE

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TABLE OF CONTENTS

Pages

H. K. Porter Company, Inc. v. Metropolitan Dade County,
825 F.2d 324 (11th Cir. 1987) ..... App. 1

H. K. Porter Co., Inc. v. Metropolitan Dade County,
Case No. 81-2766-CIV-EBD
(S.D. Fla. May 8, 1986) .....App. 24

J.A. Croson Co. v. City of Richmond,
822 F.2d 1355 (4th Cir. 1987) .....App. 56

Instructions for The Development of an MBE Program Pursuant to UMTA Circular 1165.1, UMTA Interim Minority Business Enterprise Policy and Requirements, Section 4 Percentage Goals .....App. 89

[324]

H.K. PORTER COMPANY, INC.,
Plaintiff-Appellant,

v.

METROPOLITAN DADE COUNTY, John Dyer, individually and as Contracting Officer for Metropolitan Dade County, Defendants-Appellees.

No. 86-5448.

United States Court of Appeals,
Eleventh Circuit.

Aug. 24, 1987.

Lowest bidder brought action against county to challenge affirmative action program requiring 5% participation by minority business enterprises in construction of electrified third rail of metropolitan transit system. The United States District Court for the Southern District of Florida, No. 81-2766-CIV-EBD, Edward B. Davis, J., awarded summary judgment to county. Lowest bidder appealed. The Court of Appeals held that: (1) statutes, which prohibit discrimination in programs or activities receiving federal financial assistance, permitted Urban Mass Transit Administration of Department of Transportation to impose affirmative action, minority business enterprise requirement, and (2) affirmative action program did not violate equal protection.

Affirmed.

1. Civil Rights —9.5

Statutes, which prohibit discrimination in programs or activities receiving federal financial assistance, permitted Urban Mass Transit Administration of Department of Transportation to impose affirmative action, minority business enterprise requirement on contract for electrified third rail of metropolitan transit system. Surface Transportation Assistance Act of 1978, § 101 et seq., 92 Stat. 2689: Civil Rights Act of 1964, § 601, as amended, 42 U.S. C.A. § 2000d; Urban Mass Transportation Act of 1964, § 19(a)(1), as amended, 49 U.S.C.A. § 1615(a)(1).

2. Constitutional Law —219.1

Affirmative action program, that required 5% participation by minority business enterprises in construction of electrified third rail of metropolitan transit system, was justified by Congress' compelling interest in eradicating continuing effects of past discrimination, was narrowly tailored to achieve stated goal of fostering minority participation, and did not violate equal protection, where program ended when construction was completed, and where bidding procedure excused bidder from contracting or subcontracting with minority business enterprises, if bidder demonstrated reasonable effort to contact and negotiate with minority businesses. Surface Transportation Assistance Act of 1978, § 101 et seq., 92 Stat. 2689; Civil Rights Act of 1964, § 601, as amended, 42 U.S.C.A. § 2000d; Urban Mass Transportation Act of 1964, § 19(a)(1), as amended, 49 U.S.C.A. § 1615(a)(1); U.S.C.A. Const. Amend. 14.

3. **Constitutional Law —219.1**

County, that used affirmative action program requiring 5% participation by minority business enterprises in construction of electrified third rail of metropolitan transit system, was not required by equal protection clause to make findings in addition to Congress' legislative findings establishing that minorities did not participate in government contracts. Surface Transportation Assistance Act of 1978, § 101 et seq., 92 Stat. 2689; Civil Rights Act of 1964, § 601, as amended, 42 U.S.C.A. § 2000d; Urban Mass Transportation Act of 1964, § 19(a)(1), as amended, 49 U.S.C.A. § 1615(a)(1); U.S.C.A. Const. Amend. 14.

[325] Guy W. Harrison, Mershon, Sawyer, Johnston, Dunwody & Cole, Charles C. Kline, Miami, Fla., for plaintiff-appellant.

Robert S. Ginsburg, Dade Co. Atty., R.A. Cuevas, Jr., Asst. Co. Atty., Miami, Fla., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before FAY and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

The dispute in this case arises out of the award of a federal construction contract for the electrified third rail of Miami's metropolitan transit system. Appellee, Metropolitan Dade County ("MDC") awarded the

contract to the second lowest bidder, Transit Products, Inc. based upon an affirmative action plan. The low bidder, H.K. Porter, Inc., appellant, alleged that the affirmative action plan was unconstitutional. The district court awarded summary judgment to MDC. Finding no error, we affirm.

The facts and procedural history are set out in detail in this court's opinion, *H.K. Porter Co., Inc. v. Metropolitan Dade County*, 650 F.2d 7[illegible]3, 779-81 (5th Cir. 1981).[1] For the purposes of the immediate controversy, however, we here set forth a brief synopsis of the relevant facts.

On November 6, 1978, Congress passed the Surface Transportation Assistance Act of 1978 ("STAA"), Pub.L. No. 95-599, 92 Stat. 2689 (1978), which appropriated sums of federal money for the construction of highways and mass transportation systems. In the STAA legislative history, the House report of the Committee on Public Works and Transportation acknowledged a departmental initiative on behalf of the Department of Transportation ("DOT") to encourage the participation of minority business enterprises in the DOT's programs. H.R. Rep. No. 95-1 85, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 6575, 6647. To facilitate this initiative, grantees of STAA funds were required to establish written affirmative action plans which included percentage goals for minority business participation.

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[1]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc) this court adopted as precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

In 1979 MDC proposed to construct a rapid transit system for the metropolitan Miami area. Pursuant to the STAA, the Urban Mass Transit Administration ("UMTA") of the Department of Transportation ("DOT") would finance 80% of the costs of the project. MDC would contribute the remaining 20%. On December 30, 1977, DOT issued Circular 1165.1—a statement of DOT's policy and requirements for UMTA grant recipients. The circular stated that "It is UMTA policy that MBE's [minority business enterprises][2] shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with UMTA funds." The circular further stated that failure to follow UMTA policy could result in disqualification of grantee funds. Additionally, on March 6, 1978, DOT issued Order 4000.7A,[3] [326] which re-emphasized the

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[2]For the purposes of contract Y-621, a minority business enterprise was defined as:

> a business enterprise that is owned and controlled by one or more socially or economically disadvantaged persons. Such disadvantage may arise from cultural, racial, chronic economic circumstances or background, or other similar cause. Such persons would include, but not be limited to, Blacks (not of Hispanic origin); Hispanics; Asians or Pacific-Islanders; American Indians or Alaskan Natives; and women, regardless of race or ethnicity.

[3]Order 4000.7A stated in pertinent part:

> a. It is the policy of the Department of Transportation to encourage and increase the participation of businesses owned and controlled by minorities, including women, (MBEs) in contracts and projects funded by the Department. Economically and socially disadvantaged individuals, including minorities and women, have traditionally been underrepresented as owners and managers of businesses in this country. The

enforcement of DOT's MBE program. Both the circular and the order encouraged all grant recipients to establish percentage goals for MBE participation.

(Footnote 3 Continued)

executive and legislative branches of the federal government have long recognized the need to promote the development of businesses owned by the economically and socially disadvantaged to achieve the goal of equal opportunity. To overcome the traditional underrepresentation of these groups in the business community, the federal government has used its procurement authority and its financial assistance programs to state and local governments as vehicles to assist minority business enterprises. Executive Order 11625 directs the Department of Commerce to provide technical and financial assistance to promote MBEs. Executive Order 11625 further requires that federal executive agencies develop comprehensive plans and programs to encourage minority business enterprise.

b. The Department of Transportation is firmly committed to fulfilling its responsibilities under this Executive Order and to meet the goal of greater MBE participation in contracts and projects funded by the Department, although this may result in some increased cost to DOT. To this end, DOT is requiring each of its operating elements and all aid recipients and their contractors to make strong affirmative action efforts designed to set and meet goals for increasing MBE involvement. These efforts will encompass all aspects of the procurement of supplies, equipment, contruction and services, including professional service contracts, concession contracts and bank deposits.

c. The Department recognizes that meaningful gains in the level of MBE participation can be achieved only with energetic enforcement of this order and the commitment of all DOT employees, grantees and contractors to the goals of equal opportunity.

On June 10, 1979, MDC advertised for bids[4] from prime contractors interested in the electrified third rail to be used in the construction of the transit system under contract Y-621. Pursuant to STAA's initiative, MDC's bid invitation included a minority contractor provision which required each bidder to either (a) involve MBE's in 5% of the contract work or (b) demonstrate that it has made every reasonable effort to contract and negotiate with minority contractors in an attempt to achieve the stated goal. The bid invitation also contained a provision which allowed the bidder to demonstrate that it was unable to involve minority business, notwithstanding their efforts to contact and negotiate, because minority contractors were either not qualified to do the work

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[4]Contract Y-621's bidding requirements and procedures required each bidder, as part of its bid submission, to submit:

> a completed Schedule for Participation by Minority Contractor, listing those Qualified Minority Contractors with which the Bidder intends to contract for the performance of portions of the work under the Contract, specifying the agreed price to be paid to each such Minority Contractor for such work, identifying in detail the contract items or parts thereof to be performed by each such Minority Contractor, including a proposed timetable for the performance of each such contract item and providing other information as may be required by the Schedule. No work shall be included in the Schedule which the Bidder has reason to believe the listed Minority Contractor will subcontract, at any tier, to a non-Minority Contractor.
>
> a completed and signed Letter of Intent for each Minority Contractor listed in the Schedule;
>
> a completed and signed Minority Contractor Identification Statement of each Minority Contractor listed in the Schedule and for the Bidder if it is a Minority Contractor, but no Minority Contractor Identification Statement is required for any Minority Contractor named in the Minority Contractor List,

required of the contract or because minority contractors were unavailable. The contract's Minority Contractor Participation Provision required each bidder to list the minority contractors the bidder intended to use if awarded the contract.

MDC received three bids for contract Y-621. The two lowest bids were received from Transit Products, Inc., ("Transit") and H.K. Porter ("Porter"). The bid from [327] Transit was for $8,373,502 and the bid from Porter was for $8,076,506.80. However, Porter, rather than list the minority contractors it intended to use if awarded the contract, left the six pages in contract Y-621's Minority Contractor Participation Provision blank. Porter instead attached a letter stating that no minority firms produced the required materials and that Porter would therefore "follow the same plan and outlines that

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(Footnote 4 Continued)

> and in the event the work listed on the Schedule is not sufficient to fulfill the stated goal, a statement by the Bidder of the reasons why it believes it is in compliance with this Provision and a list of the names, addresses and telephone numbers of the Minority Contractors contacted by the Bidder with respect to the performance of work under the Contract. The listing of a Minority Contractor by a Bidder on its Schedule shall constitute a representation by the Bidder that such Minority Contractor is Qualified and not Unavailable, and a commitment by the Bidder that if it is awarded the Contract it will enter into a sub-contract with such Minority Contractor for the portion of the work and at the price set forth in its bid submission, subject to the terms of this Provision.

The bidding procedures further stated that "MDC shall not award a [c]ontract to any [b]idder which it determines fails to comply with the applicable requirements of this [p]rovision."

we have had approved on other transit programs." The bid submitted by Transit involved 5% minority contractor participation in compliance with contract Y-621's 5% MBE goal.[5] MDC decided, after extensive proceedings[6] both at the administrative level and in federal court to accept the bid proposed by Transit, despite the fact that Porter's bid was lower since Porter's bid did not comply with the contract's MBE provisions. Porter was given a compliance hearing on November 28, 1979. At the compliance hearing Porter was asked by MDC's Compliance Officer, Dr. James Corbin, to explain why it had not complied with contract Y-621's bidding procedure of listing the minority contractors it had contacted in order to meet the 5% MBE goal. Porter responded by stating that it had made a recent investment in an in-house assembly plant in Chicago that totally assembled all the component parts of the electrified third rail. Porter stated that due to its in-house assembly plant, only four items from outside sources were necessary to produce the electrified rail.[7] Porter stated that no minority firms produced any of these four items. Porter testified that because of the nature of its in-house plant, it was "economically

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[5]One of the minority firms Transit originally included in its bid for contract Y-621 was questioned by Porter as not being a bona fide MBE. Transit thereafter substituted a legitimate MBE, as it was allowed to do under contract Y-621's bidding procedure.

[6]*See H.K. Porter*, 650 F.2d 778 (5th Cir. 1981).

[7]The General Manager of Porter's in-house assembly plant in Chicago, Mr. Gerhard O. Mietz, stated that contract Y-621 required four basic components: (1) steel rail, (2) aluminum extrusions, (3) a bolt holding the steel rail and aluminum together, and (4) oxide-inhibiting paste to be applied to aluminum and steel.

impracticable" to break down contract Y-621 in an attempt to subcontract to MBE's.

On December 10, 1979, MDC's Contracting Officer, John Dyer, opined to MDC's Board of County Commissioners that Porter's bid was not in compliance with the minority participation provisions of contract Y-621. On December 10, 1981, Porter brought the immediate action against MDC, and John Dyer, as the Contracting Officer. Porter's complaint alleged that MDC's 5% MBE goal was both unconstitutional on its face and as applied in violation of 42 U.S.C. §§ 1981, 1983, 2000d (1982) and 49 U.S.C. § 1615 (1982). Porter also contended that MDC and John Dyer acted in an arbitrary and capricious manner in denying contract Y-621 to Porter. Porter also alleged $1,510,544.00 in damages as a result of not being awarded the contract.

Both MDC and Porter filed cross-motions for summary judgment before the district court. The district court held a pretrial conference, allowing both parties to present their arguments. The district court ruled that MDC's bidding procedure for contract Y-621 was not unconstitutional and that MDC, in denying the contract to Porter did not act arbitrarily or capriciously. The district court granted summary judgment in favor of MDC and against Porter. Under Fed.R.Civ.P. 56(c), summary judgment is proper "if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Since we find that there is no genuine issue as to any material fact, we affirm.

DISCUSSION

This case presents three issues: (1) whether the MBE program promulgated by the UMTA and MDC was violative of 42 U.S.C. § 2000d and 49 U.S.C. § 1615 thereby making the program unconstitutional on its face; (2) whether MDC acted unconstitutionally by employing a 5% MBE participation [328] provision in its bidding procedure for contract Y-621; and (3) whether MDC acted arbitrarily and capriciously in denying the award of contract Y-621 to Porter.

With respect to the facial unconstitutionality of MDC's MBE program, Porter argues that the UMTA did not have the authority to promulgate such a program because Congress has statutorily prohibited any and all UMTA-funded programs from employing affirmative action. 42 U.S.C. § 2000d (1982) provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Porter argues § 2000d, therefore, cannot be used to authorize the MBE program propounded by UMTA. 49 U.S.C. § 1615(a)(1) provides:

> (a)(1) No person in the United States shall on the grounds of race, color, creed, national origin, sex, or age be excluded from participation in, or denied the benefits of, or be subject to discrimination under any project, program, or activity funded in whole or in part through financial assistance under this chapter.

Accordingly, Porter argues, any use of racial, ethnic or sexual criteria in awarding contract Y-621 is facially violative of both 42 U.S.C. § 2000d and 49 U.S.C. § 1615. Although we agree with Porter that the use of racial, ethnic or sexual preferences as a basis to award government contracts appears to be contrary to the clear language of the statutes, we are constrained to follow the precedential mandates of the Supreme Court. The Supreme Court has recently stated, "[i]t is now well established that government bodies . . . may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination." *United States v. Paradise*, ____ U.S. ____, ____, 107 S.Ct. 1053, 1064, 94 L.Ed.2d 203 (1987). In *United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), the Court held that Congress, in Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended 42 U.S.C. § 2000e, et seq., left free both private unions and employers to voluntarily employ a collectively bargained plan that reserves for black employees 50% of the opening positions in an in-plant craft-training program until the percentage of black craftsmen in the plant is commensurate with the percentage of blacks in the local labor force. In *Weber*, the respondent argued that Congress intended in Title VII to prohibit all race-conscious affirmative action plans. Respondent's argument was based upon a literal interpretation of § 703(a) and (b) of Title VII. Those sections on their face make it unlawful to discriminate on the basis of race in the hiring and selection of apprentices for training programs. *Weber*, 443 U.S. at 201, 99 S.Ct. at 2726. In rejecting a literal interpretation of those statutes, the Court stated, "[i]t is a 'familiar rule, that a thing may

be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.' " *Id.*, (quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892)). The Court stated that the prohibition against discrimination contained in § 703(a) and (b) must be construed in light of the legislative history of the acts and the historical context in which the acts arose. *Id.*

In *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), the Supreme Court upheld the facial constitutionality of a similar federally funded project, which included a similar MBE provision. In *Fullilove*, Congress had enacted the Public Works Employment Act of 1977, 42 U.S.C. §§ 6701-6736, which authorized $4 billion dollars for federal grants made by the Secretary of Commerce to state and local governmental entities for use in local public work projects. Section 103(f)(2) of the Act, the MBE provision, required at least 10% of any local works project to be set aside for minority business enterprises. In upholding the constitutionality of the MBE provision as a legitimate remedial congressional objective, the Court stated [329] that, "[t]he legislative objectives of the MBE provision must be considered against the background of ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity." *Fullilove*, 448 U.S. at 463, 100 S.Ct. at 2767.

[1] Therefore, we here analyze the prohibitions against discrimination contained in § 2000d and 49 U.S.C. § 1615(a)(1) in light of the legislative and historical context in which the acts arose. An

examination of the legislative and historical background giving rise to the promulgation of § 2000d and § 1615(a)(1) clearly indicates that Congress was addressing the need to ensure that minority business firms would be provided with a fair opportunity to participate in federally-funded government contracts. Indeed, in § 1615(a)(2) of the Act, Congress delegated to the Secretary of Transportation the responsibility to take affirmative action to assure compliance with Congress' determination that minorities were not fully participating in public contracts at the federal, state, and local level.

> Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitution antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct.

Fullilove, 448 U.S. at 483-84, 100 S.Ct. at 2777. Thus we conclude that in this case the UMTA had the authority, pursuant to the clear and strong Congressional mandate, to promulgate the MBE program relative to contract Y-621.

Porter also argues, however, that the MBE provisions of contract Y-621 were unconstitutional as applied. Porter's argument is grounded solely in Porter's interpretation of this court's opinion in *South Florida Chapters of Associated Contractors of America v. Metropolitan Dade Co.*, 723 F.2d 846 (11th Cir.), *cert. denied*, 469 U.S. 871, 105 S.Ct. 220, 83 L.Ed.2d 150 (1984). Porter alleges that the MBE provisions of contract Y-621 were unconstitutionally applied because the authorities failed to follow the three "common concerns" enunciated in *South Florida. Id.*, at 851-52. Porter argues that *South Florida* provides "a clear and detailed blueprint" for evaluating all minority preference programs. We think Porter's reliance on *South Florida* is misplaced. *South Florida* involved the constitutionality of a county ordinance and resolution granting to black contractors preferential treatment in the county's bidding process. *South Florida*, 723 F.2d at 847-48. In *South Florida* the Dade County Commission, in response to the May 1980 disturbances in Liberty City, passed an ordinance which operated to waive altogether the formal contract bidding process and to grant to black contractors the exclusive right to bid on the construction projects of the county. The ordinance also contained a sub-contractor's provision requiring that fifty percent of the dollar value of any county contract be awarded to black sub-contractors. *Id.*, at 848-49. The ordinance was challenged both facially and as applied to the county construction project for the Earlington Heights Metro-rail Station.[8] *Id.* at 848.

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[8]The Earlington Heights Metrorail Station is one of the metrorail stations located in Dade County.

In analyzing the constitutionality of the race-conscious legislation, this court "[w]ithout adopting a formal 'test.'" *South Florida*, 723 F.2d at 852, articulated what it construed to be the three common concerns to the various views of the Supreme Court in *Regents of the Univ. of California* [330] *v. Bakke*,[9] 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), and *Fullilove*, 448 U.S. 448, 100 S.Ct. 2758: "(1) that the governmental body have the authority to pass such legislation; (2) that adequate findings have been made to ensure that the governmental body is remedying the present effects of past discrimination rather than advancing one racial or ethnic group's interest over another, and (3) that the use of such classifications extend no further than the established need of remedying the effects of past discrimination." *South Florida*, 723 F.2d at 851-52. These common concerns were set forth merely as safeguards to be used by a reviewing court in analyzing "*[l]egislation* employing benign racial preferences." *Id.*, (emphasis supplied). We therefore reject Porter's contention that *South Florida* provides federal courts with a detailed set of mandatory guidelines with which to analyze the constitutionality of any and all MBE programs.

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[9] *Regents of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) was the Supreme Court's first direct confrontation with affirmative action programs. Petitioner Bakke challenged an admission program of the University of California's Davis Medical School, whereby sixteen of one hundred spaces available for the entering class were set aside solely for minority applicants. The case produced no majority, however, five justices held the quota invalid.

Moreover, the Supreme Court has set forth a two-prong test to be applied in situations wherein preferential classifications are based upon racial and ethnic distinctions. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, ____, 106 S.Ct. 1842, 1846, 90 L.Ed.2d 260 (1986). In *Wygant*, the Court was called upon to decide the constitutionality of whether a school board could, consistent with the Equal Protection Clause, extend preferential employment protection to certain employees solely because of their race or ethnic origin. *Wygant*, 106 S.Ct. at 1884. The Court stated the classifications operated "against whites and in favor of certain minorities, and therefore constitutes a classification based on race." *Id.* at 1846. The Court went on to state such classifications must be justified by a compelling government interest. *Id.* Secondly, the means chosen to effectuate this interest or purpose must be narrowly tailored to the achievement of that goal. *Id.* (citing *Fullilove*, 448 U.S. at 480, 100 S.Ct. at 2775).

In addition, the Court has recently set forth factors to be considered in analyzing the appropriateness of race-conscious remedies. *Paradise*, 107 S.Ct. at 1067. These factors include, "the necessity for the relief and the efficacy of alternative remedies, the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *Id.* We will therefore analyze the constitutionality of contract Y-621's MBE provision under the test set forth in *Wygant* while also considering the factors articulated in *Paradise*.

[2] We have noted that MDC, in implementing the MBE provisions of contract Y-621, was acting pursuant to Congress' compelling interest in eradicating the continuing effects of past discrimination against minorities in the participation of government contracts. *See Fullilove*, 448 U.S. at 497, 100 S.Ct. at 2784 (Powell, J., concurring); Further, the Supreme Court has recently made it clear that "[t]he government unquestionably has a compelling interest in remedying past and present discrimination by a state actor." *Paradise* 107 S.Ct. at 1065. Congress' determination to foster greater MBE participation in government contracts was due, in part, to the fact that other potential possible remedies had proven unsuccessful. *See Fullilove*, 448 U.S. at 511, 100 S.Ct. at 2791 (Powell, J., concurring).

As for the duration of the relief, there is nothing in the record to suggest that MDC's bidding procedure for contract Y-621, including the MBE provision, was anything more than a temporary remedy. It was simply an absolute condition MDC had to meet to receive federal funds through the UMTA in order to finance the construction [331] of the metrorail system. This procedure, being temporary, was not a policy of MDC to maintain a racial or ethnic balance, but was rather intended by Congress to eliminate a manifest racial and ethnic imbalance. *See Weber*, 443 U.S. at 208, 99 S.CT. at 2729. Indeed, this particular program ended when the construction for contract Y-621 was completed. MDC's bidding procedure for contract Y-621 also contained a waiver provision which operated to excuse the bidder from contracting or subcontracting with MBE's if the bidder demonstrated that it had made every reasonable effort to contact and negotiate with

MBE's but was unable to achieve the 5% goal despite such efforts due to the fact that minority contractors were not qualified or not available. *See Fullilove*, 448 U.S. at 487, 100 S.Ct. at 2779 (significant that an administrative scheme provides waiver mechanism under MBE program).

We next consider whether the 5% goal implemented by MDC in connection with contract Y-621 is sufficiently narrowly tailored to achieve the stated goal of fostering greater minority participation in government contracts. *See Paradise*, 107 S.Ct. at 1067-74; *Wygant*, 106 S.Ct. at 1846. In *Wygant*, the Supreme Court decided a case involving constitutional implications analogous to the constitutional questions presented in this case. *Id.* at 1844. As we noted earlier in *Wygant*, the Court was called upon to decide whether a school board could, consistent with the equal protection clause, extend preferential employment protection against layoffs to its employees solely because of their race or national origin. *Wygant*, 106 S.Ct. at 1844. In *Wygant*, community racial tensions prompted the Jackson Board of Education to include a layoff provision in the collective bargaining agreement between the Board of Education and the Jackson Education Association that operated to lay off tenured non-minority teachers while allowing minority teachers on probation status to be retained. *Id.*, 106 S.Ct. at 1844-45. When layoffs became necessary the Board retained the tenured non-minority teachers, thus refusing to follow the layoff provision of the collective bargaining agreement. *Id.*, 106 S.Ct. at 1845. The Jackson Education Association, along with two minority teachers who had been discharged, alleged the Board's failure to adhere to the layoff provision

violated the equal protection clause of the fourteenth amendment and Title VII of the Civil Rights Act of 1964. *Id.* On cross motions for summary judgment, the district court, *inter alia*, dismissed the claims holding "that the racial preferences granted by the Board need not be grounded on a finding of prior discrimination." *Id.*, at 1846. The Court of Appeals for the Sixth Circuit affirmed. *Id.* The Supreme Court reversed holding that the layoff plan was not sufficiently narrowly tailored, *inter alia*, because the plan was not supported by finding of past discrimination. *Id.* at 1846-52. The court pointed out that "some showing of prior discrimination by the governmental unit involved" must be demonstrated before allowing even a limited use of racial and ethnic classifications in order to remedy prior discrimination. *Id.* at 1847.

[3] Porter argues that since Congress delegated to MDC the actual implementation of contract Y-621's MBE provision, MDC was required to make detailed and specific findings concerning past discrimination. We disagree. As indicated, MDC in implementing the MBE provisions of contract Y-621, was relying on Congress' legislative findings which clearly established that minorities were not participating in government contracts. *See Fullilove*, 448 U.S. at 478, 100 S.Ct. at 2774. Indeed, Congress' findings led the STAA to require that minority percentage goals be established as an absolute condition precedent to the receipt of federal funds. We hold that under the circumstances of this case, MDC was not constitutionally required to make additional findings of past discrimination regarding the awarding of this contract. Congress was concerned about a national problem. Its findings provide adequate support for such local projects.

Porter argues, nevertheless, that the 5% MBE goal in contract Y-621 is not narrowly tailored and thus unconstitutional as applied [332] because the goal was not based upon a study or investigation of the availability of qualified MBE's to participate in contract Y-621. The record does not suggest that MDC conducted such detailed studies regarding past discrimination against MBE's in the awarding of construction contracts or investigations regarding the availability of MBE's qualified to participate in contract Y-621.[10] We must concede that we are troubled by MDC's decision to use the 5% figure without supporting or substantiating the figure with some sort of consideration of the 5% goal to the relevant labor market of MBE's available to participate in contract Y-621. *See Paradise*, 107 S.Ct. at 1071. We share the Supreme Court's concern with racial and ethnic factors when used as a basis for affirmative action programs. *See Wygant*, 106 S.Ct. at 1847. ("Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Wygant*, 106 S.Ct. at 1846 (quoting *Fullilove*, 448 U.S. at 491, 100 S.Ct. at 2781). Opinion of Burger, C.J.). However, federal courts have upheld affirmative action programs utilizing figures much higher than the modest 5% figure MDC implemented in this case. As noted, the Supreme Court in *Fullilove*, approved the use of a 10% MBE goal as sufficiently narrowly tailored to be a constitutionally acceptable

[10]MDC in fact proffered studies allegedly supporting the determination of a 5% MBE goal for contract Y-621 at the district court, however, the district court did not allow the proffered studies into evidence. MDC has not cross-appealed this ruling. Thus, no such studies appear in the record for our consideration.

means of redressing the present effects of past discrimination. *Fullilove*, 448 U.S. 448, 100 S.Ct. 2758. In *Weber*, the Court held Title VII did not prohibit an affirmative action plan collectively bargained between the United Steelworkers of America and Kaiser Aluminum & Chemical Corporation which reserved for black employees 50% of the opening positions in a sought after training program. *Weber*, 443 U.S. at 208-09, 99 S.Ct. at 2729-30. The Court in *Paradise*, 107 S.Ct. at 1067-74, upheld a one-black-for-one-white race conscious promotional requirement within the Alabama Department of Public Safety imposed by the district court as being sufficiently narrowly tailored to remedy past discrimination. It is also significant that MDC's implementation of this affirmative action program does not unnecessarily trammel the interest of non-minority contractors or sub-contractors, and thus does not impose an unacceptable burden on innocent third parties. *See Paradise*, 107 S.Ct. at 1073; *Weber*, 443 U.S. at 208, 99 S.Ct. at 2729. All that was required by Porter was that Porter demonstrate that it had made every reasonable effort to meet the 5% MBE provision, or demonstrate that it was unable to do so despite such efforts because minority contractors were not qualified or were not available. Further, the record reflects that MDC's decision to deny the award of contract Y-621 to Porter was not based solely on Porter's failure to meet the 5% MBE goal. The decision was also based on Porter's failure to make any effort to attempt to locate and contract or sub-contract with MBE's. The district court, in granting summary judgment against Porter, noted that Porter did not contact a single MBE, other than its already existing suppliers. We agree with MDC and the district court's conclusion that Proter has not demonstrated that it made every reasonable effort to

attempt to locate and contract or sub-contract with MBE's. The district court concluded that the MBE provision of contract Y-621 was not unconstitutional. After our own examination of the record, taking into consideration the particular facts of this case and the relevant case law, we hold that MDC's use of a 5% MBE goal in contract Y-621 is not unconstitutional.

Porter's last argument is that MDC acted arbitrarily and capriciously in denying the award of the contract to Porter. Having held that MDC's bidding procedure for contract Y-621 is constitutional, this argument is without merit.

AFFIRMED.

[FILED MAY 9 1986]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-2766-CIV-EBD

H.K. PORTER CO., INC.

Plaintiff,

vs.

METROPOLITAN DADE COUNTY, FLORIDA, and JOHN A. DYER, individually and as contracting officer for Metropolitan Dade County, Florida,

Defendants.

OPINION OF THE COURT GRANTING DEFENDANTS' MOTION FOR FINAL SUMMARY JUDGMENT

THIS MATTER is before the Court on the parties' cross-motions for summary judgment. At a pretrial conference, the Court heard argument from counsel on the issues to be tried and made various evidentiary rulings. The parties stated that the case could be decided without a trial upon the pleadings, if the record in *H.K. Porter Co., Inc. v. Metropolitan Dade County,* Case No. 79-4875-CIV-KING, were incorporated in the record in this case and the parties were allowed to supplement the record. The Court agreed to incorporate the record in Judge King's case into this case and allowed the

parties to supplement the record. The Court agreed that the case could be taken under advisement on the parties' cross-motions for summary judgment on the issue of liability, although genuine issues of material fact remained as to the amount of damages. Rule 56(c) of the Federal Rules of Civil Procedure states: "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

For the reasons expressed in this opinion, the Court concludes that the Defendants are not liable for damages to the Plaintiff, Therefore, Defendants' motion for summary judgment is GRANTED, and Plaintiff's motion for summary judgment is DENIED. Defendant is awarded taxable costs of this litigation in accordance with 28 U.S.C. §1920 and Fed.R.Civ.P. 54(d), to be taxed by the Clerk of this Court. Each party shall bear its own attorney's fees pursuant to 42 U.S.C. §1988. The Clerk is directed to close this case.

I. PLAINTIFF'S CLAIM

Plaintiff contractor, H.K. PORTER CO., INC., alleges that the inclusion of a 5% minority business enterprise goal in a contract for Defendant DADE COUNTY's Metrorail System amounts to reverse racial discrimination against white-owned contractors in violation of civil rights laws and the Constitution, actionable under 42 U.S.C. §1981, 42 U.S.C. §1983, 42 U.S.C. §2000d, and 49 U.S.C. §1615 and within this Court's federal question jurisdiction, 28 U.S.C. §1331 and its jurisdiction under 28 U.S.C. §1343. Defendants' minority business enterprise goal is allegedly

unconstitutional on its face and unconstitutional as applied to Plaintiff, H.K. PORTER. Further, Plaintiff contends that Defendant, JOHN A. DYER, contracting officer with Metropolitan Dade County, in refusing to waive the 5% minority business enterprise goal to award H.K. PORTER the Metrorail contract in question, acted in an arbitrary and capricious manner in violation of Florida administrative law, actionable as a pendent claim within this Court's diversity of citizenship jurisdiction pursuant to 28 U.S.C. §1332. Defendants deny violating either the federal civil rights laws of Florida administrative law by their decision not to award Plaintiff the Metrorail contract.

Plaintiff seeks damages in the amount of $1,510,544.00, plus interest on the damages from 1979, in addition to costs and attorney's fees.

II. PROCEDURAL HISTORY

This protracted litigation over a contract for the electrified third rail in DADE COUNTY's Metrorail rapid transit system began in District Court for the Southern District of Florida in October, 1979. The first lawsuit was styled *H.K. Porter Co., Inc. v. Metropolitan Dade County,* Case No. 79-4875-CIV-KING. A December 28, 1979 ruling by Judge James W. Kehoe in that case was appealed to the former Fifth Circuit, which vacated Judge Kehoe's order on procedural grounds and remanded the case with instructions to dismiss the complaint for injunctive relief without prejudice. *H.K. Porter Co., Inc. v. Metropolitan Dade County,* 650 F.2d 778, 783 (5th Cir. Unit B 1981) (Johnson, J.) The Court of Appeals held that Judge Kehoe, in granting

Defendant DADE COUNTY's motion to dissolve a temporary restraining order, improperly ruled against the Plaintiff on the merits of its constitutional claim instead of restricting its review to the temporary restraining order issues before it. *Id.* In accordance with the mandate of the former Fifth Circuit, Judge King dismissed the complaint, which had solely sought injunctive relief, in Case No. 79-4875-CIV-KING on September 20, 1981. On December 10, 1981, Plaintiff, H.K. PORTER filed a new complaint regarding the same matters involved in the first lawsuit, but seeking money damages and adding JOHN A. DYER as a Defendant. In accordance with the ruling of the Court of Appeals, this Court has accorded no precedential effect to Judge Kehoe's order ruling against Plaintiff on the merits. *See Id.* ("the district court's order will be without precedential effect"). The Court has reviewed the file in the first lawsuit, received voluminous additional evidence, reviewed numerous memoranda submitted to the Court, and heard argument of counsel on the merits of Plaintiff's claim.

III. FACTS

The facts are well-presented in Judge Johnson's opinion for the former Fifth Circuit, *H.K. Porter Co., Inc. v. Metropolitan Dade County,* 650 F.2d 778, 779-781 (5th Cir. Unit B 1981).

"On June 10, 1979, appellee Metropolitan Dade County (MDC) advertised for bids on an electrified third rail of a proposed rapid transit system for the Miami metropolitan area scheduled for completion in 1984. The construction costs for the electrified rail entitled

Contract Y-621 were estimated at $9.1 million; the Urban Mass Transit Administration (UMTA) of the Department of Transportation (DOT) was to finance 80% of these costs through a federal grant and MDC would contribute 20% of the costs. On August 8, 1979, three bids on Contract Y-621 were received and Porter Co.'s $8,076,506.30 bid was the lowest; Transit Products, Inc., (Transit), which is not a party to this action, made the second lowest bid at $8,373,502.00.

"MDC's bid invitation included a Minority Contractor Participation provision (Addendum 3) which required each bidder to either (a) involve minority business enterprises (MBD's) at 5% of the contract work or (b) demonstrate that it has made every reasonable effort to contract and negotiate with minority business enterprises in an attempt to subcontract work to achieve the 5% goal.[1] Porter Co.'s bid included the Addendum 3 forms but the forms were blank; Transit's bid included two minority contractors (businesses owned or controlled by women) for $580,000 of the contract work. Transit protested Porter's bid for failing to comply with Addendum 3. MDC decided to reject all of the bids on Contract Y-621 but it failed to follow its own procedures in doing so.

"On October 17, 1979, Porter Co. filed this diversity action against MDC alleging its failure to offer Porter Co. the requisite administrative review to determine whether Porter Co.'s bid was in compliance with the MBE provision. The district court (Judge King) granted Porter Co. an *ex parte* TRO on October 18, 1979, to maintain the status quo until the court could entertain Porter Co.'s preliminary injunction motion.[2] The TRO

was extended twice and was to expire on November 3, 1979; on November 2, 1979, the district court granted Porter Co.'s summary judgment motion and ordered MDC to reinstate all of the bids and to hold a hearing before a Contracting Officer as required by MDC's regulations in order to evaluate the responsiveness of Porter Co.'s bid. During the interim, Porter Co. had amended its complaint to allege that MDC's rejection of all the bids was arbitrary and capricious and to request a mandatory injunction requiring MDC to award the contract to Porter Co.

"The compliance hearing was held on November 28, 1979, before Contracting Officer John Dyer; after hearing Porter Co.'s evidence, Dyer determined that Porter Co. had not complied with MBE's provision and indicated that he would recommend that Transit be awarded the contract.[3] UMTA concurred with Dyer's decision which assured the 80% federal participation. After learning that Dyer planned to make his recommendation to MDC on December 18, 1979, Porter Co. sought and received, on December 18, an emergency *ex parte* TRO which enjoined MDC from awarding the contract to another bidder for ten days. Porter Co. also moved for an order to show cause why MDC should not be held in contempt of the district court's summary judgment order. MDC responded by moving for an emergency hearing to dissolve the TRO because the delay in awarding Contract Y-621 was causing a significant increase in the contract's overall price.

"The district court (Judge Kehoe)[4] held a hearing on these motions on December 18 and 19 at which both parties were able to argue and present evidence. Porter

Co. amended its show cause motion on December 20, 1979, to allege for the first time that the MBE requirements exceeded the government's statutory authority and violated the equal protection clause of the Constitution and Title VI of the Civil Rights Act of 1964. Additionally, Porter Co. moved on December 21 for leave to file a supplemental complaint which sought to join the United States Secretary of Transportation as a party and included the allegations of the unconstitutionality of MDC's actions. On December 27, 1979, Porter Co. filed a second preliminary injunction motion to preserve the status quo once the TRO expired on December 28; alternatively, Porter Co. moved to extend the TRO to prevent MDC from awarding the contract to Transit.

"On December 28, 1979, the district court granted MDC's motion to dissolve the TRO and denied Porter Co.'s show cause motion and motion for leave to file a supplemental complaint. In its memorandum opinion, the district court (Judge Kehoe) indicated that it was determining the merits of the pending motions of both parties. Consequently, the district court reached the merits of Porter Co.'s allegations that the MBE goal was unconstitutional; the court found that the 5% goal was constitutional and that the goal as applied to Porter Co. did not exceed the bounds of fundamental fairness. Moreover, in denying Porter Co.'s motion to show cause why MDC was not in contempt, the district court reviewed the hearing held before Contracting Officer Dyer and found that the hearing complied with Judge King's order granting summary judgment for Porter Co. The district court denied Porter Co.'s motion to add the Secretary of Transportation as a party defendant

without discussion. Porter Co.'s second preliminary injunction motion was not mentioned in the December 28, 1979 order but Porter Co. has not alleged any error with respect to the district court's treatment of that motion.

"Porter Co. filed a notice of appeal from the district court's final judgment and memorandum order on December 28, 1979. The district court had indicated during the hearing held on December 28 that it would stay its order for ten days to allow Porter Co. to apply to this Court for an injunction pending appeal. On January 4, 1980, the Fifth Circuit granted Porter Co. an additional five-day stay of the district court's order to allow consideration of Porter Co.'s Emergency Motion for Injunction Pending Appeal; however, the five-day stay was subsequently vacated on January 9, 1980, when this Court denied Porter Co.'s emergency motion. Shortly thereafter MDC awarded Contract Y-621 to Transit."

At the hearing before this Court on the parties' cross-motions for summary judgment, the Court indicated that both sides felt that there was no real factual dispute on the issue of liability, although, of course, the parties disagreed on the legal significance of the uncontested facts *See Transcript of Hearing, November 7, 1984* at 5 and 12. (Docket # 88) Counsel for the litigants agreed that the factual record was undisputed; however, Defendants' counsel sought to raise two additional matters to add to the evidence.

First, DADE COUNTY sought to withdraw two admissions it had made during discovery. The facts

admitted were: "Prior to August 22, 1979, no representative or official of the County or of the United States Department of Transportation made an investigation to determine whether five percent MBE participation was a reasonably obtainable goal or quota in connection with Contract Y-621." (Paragraph 60 of H.K. PORTER's First Request for Admissions); "The 5% participation requirement of Y-621 was not based upon a previous investigation or calculation made by MDC or UMTA." The Court refused to allow DADE COUNTY to withdraw the admissions made in 1982, agreeing with H.K. PORTER that the facts had been admitted and that there was no evidence to contradict the admissions.

Second, the County sought to introduce evidence regarding its enforcement of the minority business enterprise requirement in Contract Y-621 on the second lowest bidder, Transit Products, Inc. *See Defendant's Composite Exhibit 3. See also* Footnote 7 *infra.* Although it was undisputed that the County monitored the second-lowest bidder and substituted the original minority subcontractor, Intransco, with a genuine minority business enterprise, Tepcon, Inc., the Court felt that additional evidence and testimony regarding Tepcon, Inc., would not be relevant to the issue of liability in this case as DADE COUNTY's actions were taken after the award of the contract. The good faith actions of the County in taking corrective actions in monitoring the second lowest bidder, Transit Products, Inc.'s, minority subcontractor after the award of the contract to Transit Products, Inc., is not an issue in these proceedings. Accordingly, the Court took no further evidence on matters occurring after the award of the contract but limited itself to the events of 1979, the same matters

which Judge King and Judge Kehoe had considered in the first case, *H.K. Porter v. Dade County,* Case No. 79-4875-CIV-KING. Upon the motion of DADE COUNTY, the Court admitted the entire record in the first case into evidence in this case.

As an overview, the Court notes that not only have the facts remained the same as in the first case, the positions of the parties have remained remarkably consistent since 1979. H.K. PORTER has insisted that the 5% minority business enterprise provision in Contract Y-621 is unfair, unreasonable and not feasible because there were no minority subcontractors who could do the Metrorail work. Articulate in-house and local counsel have explained H.K. PORTER's reasons at every step of the proceedings. The federal agency, the Urban Mass Transportation Administration, Dade County's Contracting Officer, Dr. John Dyer, the Dade County Commission, which voted to award the contract to Transit Products, Inc., and Federal Judge James W. Kehoe, have all disagreed with H.K. PORTER's position.

It is undisputed that the sole reason H.K. PORTER failed to get the Metrorail contract was the 5% minority business provision with which UMTA, Dade County, and Judge Kehoe felt H.K. PORTER had failed to comply. DADE COUNTY has not argued that PORTER lacked the technical ability or finances to perform the contract. DADE COUNTY has stuck to its 5% minority business goal for contract Y-621, arguing that it was willing to pay more for a contractor who could meet the goal and arguing that minority business participation was part of what DADE COUNTY bargained for and

paid for in Contract Y-621. The County's position has remained consistent throughout these proceedings—the 5% goal was feasible and H.K. PORTER failed to comply with the contractual requirement without justification.

To summarize the events of 1979 which lead to this lawsuit, on June 12, 1979, DADE COUNTY, through its agent Kaiser Transit Group, sent advance notice and a contract specifications book to approximately 90 potential bidders for Contract Y-621 (*Plaintiff's Composite Exhibit 1/Defendant's Composite Exhibit 1*). The Contract Specifications Book, approximately 100 pages in length, sent to the bidders prominently contained notice that minority business participation would be required from any successful bidder. *See Plaintiff's Exhibit 1,* "Contract Specifications Book", at page IFB 6, G.P 27-28, Appendix B Section III, p. 1-5). On July 17, 1979, the minority business participation goal for Contract Y-621 was set at 15% (*Defendant's Exhibit 1,* Memorandum from James D. Corbin, Director of Equal Opportunity Division to William A. Skeen, Jr., Contracts Manager). On August 7, 1979, Addendum III was issued and sent to the bidders which set the minority percentage goal for Contract Y-621 at 5% of the price. (*Plaintiff's Exhibit 1,* Bid Form for bid to be opened August 22, 1979 and *Defendant's Exhibit 1,* Memorandum, Stan Burkot of Kaiser Transit Group to file dated August 13, 1979).

DADE COUNTY's engineer estimated the cost of Contract Y-621 at $9,207,800.00. When the bids were opened on August 22, 1979, the County received two excellent bids far below the engineer's cost estimate — H.K. PORTER's bid at $8,076,506.30 (*Plaintiff's Exhibit*

2, H.K. PORTER's bid form) and Transit Products, Inc. bid at $8,373,502.00 (*Plaintiff's Exhibit 3*, Transit Products' bid form). The bids were below estimate and within 3-4% of one another. Insul 8 Corporation, the third bidder, bid $11,063,591.00 for Contract Y-621. Insul 8 was the only other bid received by the County for the contract. The County decided, after extensive proceedings before the compliance monitor and in federal court, to take Transit Products' bid because it contained minority business participation, while H.K. PORTER's bid did not contain minority business participation. *Compare Plaintiff's Exhibit 2* at Appendix B, pp. 11-17 *with Plaintiff's Exhibit 3* at Appendix B, pp. 11-17).

To summarize the position of the parties, H.K. PORTER has never retreated from its view as expressed in the letter attached to the August 22, 1979 bid for Contract Y-621 written by R.E. Lillard, Manager of Transit Programs for H.K. PORTER that no minority subcontractor could do the work required on the Metrorail third-rail contract. (H.K. PORTER left the six pages in Appendix B, "Minority Contractor Participation Provision" on the Bid Form blank, including Mr. Lillard's letter instead). The letter, in its entirety, reads:

> We, the H.K. Porter Company, Inc., as a Corporation do and will adhere to every government requirement as to all EEO regulations and further, we shall attempt to involve as many minority contractors and suppliers as practicable on this program.

Due to the nature of the products as specified in this transit program with regards to the raw products that are required, i.e., steel rail, aluminum extrusions, lockbolts, etc., and the nonexistance of any minority firms in the production of these materials we shall follow the same plan and outlines that we have had approval on other transit programs.

We will appreciate any recommendations that you may have to offer with regards to this program.

R.E. Lillard
Manager, Transit Programs
H.K. PORTER CO., INC.

Plaintiff's Exhibit 2, at Appendix "B" inserted between pages 11 and 12.

Defendant, DADE COUNTY, has consistently characterized the letter as a "vague policy statement" and not in compliance with the contract's 5% minority participation goal. *See, e.g., Plaintiff's Exhibit 4*, Compliance Hearing before Dr. James Corbin, August 29, 1979 at p. 40.

The key factual determination for this Court to make is whether H.K. PORTER has proved that it falls within the "escape provision" of the Metrorail contract contained in Addendum No. 2 to the Contract, "Minority Contractors Provision, III, C: "Determination of Compliance", at pp. 4-5. Addendum No. 3 (*Plaintiff's Composite Exhibit 1*). Although H.K. PORTER claims

it was surprised and prejudiced when Addendum III, which included the 5% minority goal, was sent by DADE COUNTY on August 7, 1979, the Court finds that argument first, not credible, and second, not relevant.

Despite H.K. PORTER's complaint about receiving Addendum III, which allegedly contained "new MBE requirements" only "seven working days" before the deadline for submitting bids on Contract Y-621, the Court finds PORTER must have been aware that federal mass transit projects were going to maintain minority business requirements. The Urban Mass Transportation Administration issued Circular 1165.1, entitled "UMTA MBE Policy and Requirements" on December 30, 1977. (*Plaintiff's Exhibit 8*). As PORTER has noted, H.K. PORTER was one of the few firms in the new mass transit commuter rail industry in the United States. *See, e.g. Plaintiff's Exhibit 9*, Public Hearing, Testimony of Mr. Lillard, at 101-134. Certainly, it must have carefully followed the actions of the UMTA, which provided the bulk of the funds for the projects H.K. PORTER had in Washington, Atlanta, San Francisco, Boston, and Chicago, as well as in Miami. The 1977 Circular stated: "It is UMTA policy that MBE's shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with UMTA funds." *Plaintiff's Exhibit 8*, UMTA Circular 1165.1 at 2. Under the section entitled "basis for approval", the Circular said that the required MBE programs for federally-funded mass transit programs "shall include, at a minimum . . . percentage goals for the dollar value of work to be awarded MBEs." *Plaintiff's Exhibit 8* at 4, Number 5(a)(3). H.K. PORTER could reasonably have been surprised at the 5% goal in Contract Y-621 only

in the sense that that 5% goal was not higher. PORTER should have known that a specific goal for minority participation, rather than the unspecified general "best efforts" requirement for MBE involvement, would be required for Contract Y-621 in light of the Urban Mass Transit Administration's 1977 policy statement.

DADE COUNTY's incentive for setting a percentage of the value of the work to be awarded to MBEs in Contract Y-621 is clear and also contained in Circular 1165.1—"Failure to carry out the approved minority business enterprise action program shall be a breach of this Contract and may result in the termination of this grant, and preclude the Public Body from receiving further financial assistance under the Urban Mass Transportation Act or such other remedy as the Government deems appropriate". *Plaintiff's Exibit 8*, at pp. 6-7.

Second, H.K. PORTER's argument about the timing of its receipt of Addendum III is not relevant because PORTER's position has consistently been that no minority subcontractors existed. Therefore, no amount of additional time would have assisted H.K. PORTER under its view of the facts. Finally, H.K. PORTER did not request an extension of the bid deadline, unlike Transit Products.

Therefore, H.K. PORTER's case on its compliance with the contract, leaving aside the legality of UMTA and DADE COUNTY's 5% goal, rests on whether H.K. PORTER fell within the "escape provision" of the contract. If H.K. PORTER met the requirements for the escape provision, DADE COUNTY would be in violation

of the law and its own rules for awarding the Metrorail contract to the second-lowest bidder, Transit Products. Even though the bids were extremely close, DADE COUNTY is required to award public contracts to the lowest qualified bidder.

The "escape provision" is contained in Addendum III, Appendix B "Minority Participation Provision", Part III "Bidding Requirements and Procedures Prior to Contract Award", ¶ C "Determination of Compliance" (*Plaintiff's Exhibit 1*, Addendum No.3, pp. 4-5) It reads, in its entirety, as follows:

> C. *Determination of Compliance*—the total price for work to be performed by Minority Contractors as indicated in each Bidder's Schedule for Participation by Minority Contractors is required to be sufficient to fulfill the stated goal, unless the Bidder shall demonstrate to the satisfaction of MDC that:
>
> 1. it has made every reasonable effort to contact and negotiate with Minority Contractors in an attempt to subcontract work, including every reasonable effort to select the portions of the work proposed to be subcontracted, in order to achieve the stated goal;
>
> 2. it was unable, notwithstanding such efforts, to achieve the stated goal because Minority Contractors were not Qualified or were Unavailable; and

3. it included in its Schedule such proposed agreements as could be made with such efforts.

MDC shall not award a Contract to any Bidder which it determines fails to comply with the applicable requirements of this Provision. Nothing herein shall relieve any Bidder or any Contractor performing any work under the Contract from any of the terms, conditions or requirements of the Contract or modify MDC's rights as reserved in the Contract Documents.

It is undisputed that H.K. PORTER did not include any proposed agreements in its bid form—the pages were left blank. *See Plaintiff's Exhibit 2.* It is undisputed that H.K. PORTER did not contact any minority contractors in an attempt to subcontract work for Contract Y-621. *E.g., Plaintiff's Exhibit 9* at 54. Therefore, provisions ¶¶ C(1) and C(3) are not applicable to this determination of liability for the Metrorail contract at issue in this case. The key provision is ¶ C(2) and H.K. PORTER's contention that it was unable to achieve the stated 5% goal because minority contractors were not qualified or were unavailable.

H.K. PORTER has consistently maintained that the contact rail contract for Metrorail had to be done in-house at H.K. PORTER's special facility in Chicago, with the only subcontracting-out possibility being the provision of raw materials, for which no minority sub-contractros existed. As Lawrence E. Moncrief, H.K. PORTER's Assistant Counsel stated at the very first of many hearings in this case, the Compliance Hearing before Mr. James Corbin on August 29, 1979:

> Again, because of the nature of the process of making these rails, we feel that the only sub-out possibilitty would be the supply materials because it is a fairly sophisticated process to make this kind of rail. The only thing we feel we could sub-out would be the supply material and it is our opinion that no minority is out there who could do the job. There are no minorities who can supply aluminum extrusions. No minority contractor that extrudes aluminum to the shape we need. We have to buy it from a proprietary, the item, from those who make it. That is about it.

Plaintiff's Exhibit 4, "Compliance Hearing for Contract Y-621 H.K. Porter Company, Inc.", at 45-46.

Mr. Gerhard O. Mietz, General Manager of H.K. PORTER's Chicago Works, where the Metrorail contract was to be performed, stated that Contract Y-621 called for four basic components: (1) steel rail, (2) two aluminum extrusions, (3) a bolt holding the steel rail and aluminum together, and (4) oxide-inhibiting paste applied to the interface of aluminum and steel. *Plaintiff's Exhibit 9*, "Minority Business Enterprise Public Hearing, Re: H.K. Porter Company, Inc." November 28, 1979 at 11.

Mr. Richard E. Lillard, Manager of H.K. Porter's Transit Programs, Electrical Division, testified that he was experienced in various contact rail contracts in connection with the bidding process, procurement of supplies, and work decisions.

Plaintiff's Exhibit 9, November 28, 1979 Hearing at p. 21. Mr. Lillard testified that no minority firms produced the four major components nor the minor components needed for H.K. PORTER's in-house assembly of the rail. *Plaintiff's Exhibit 9* at 33-51.

At the Public Hearing, the following exchange took place between Dr. John Dyer, Contracting Officer and Mr. Donald K. Moe, Vice-President, General Manager, Electrical Division, H.K. PORTER COMPANY, INC.:

> Dr. Dyer: Prior to submitting your bid on Contract Y-621, did Porter affirmatively consider the possibility of contracting any or all of that remaining work to minorities or any other subcontractors, for that matter?
>
> Mr. Moe: Yes, we do and did.
>
> Dr. Dyer: What was your decision?
>
> Mr. Moe: It was negative, and I would like to tell you why that decision was negative.
>
> Dr. Dyer: Then why don't we let you go ahead and do that.
>
> Mr. Moe: Dr. Dyer, in addition to the facilities that have been discussed and related to the appurtenances and so forth, the Porter Company has made a million dollar commitment to the future of the third-rail electrification, and, this is an important part

> of the cost for the product you and other people in this business of putting new systems in require by both your specifications and actual application need.
>
> I have a layout diagram of a 17,000 square foot addition completed in February of 1979 to our H.K. Porter facility at roughly 2500 West Fulton Street, in Chicago, Illinois, and I would like to use nine photographs in walking my way through the facility to explain the process and the processes and the facility's value to the products involved in the production process.

(Mr. Moe proceeded with photographic slides showing the new facility in Chicago). *Plaintiff's Exhibit 9* at 54-55.

H.K. PORTER was able to comply with MBE requirements in Baltimore from its plant in Lynchburg, Virginia by hiring minority-owned trucking firms. For the Miami Metrorail project, Mr. Moe stated it was not commercially feasible to send the product to Miami from H.K. PORTER's plant in Chicago via truck; the transportation had to be done by rail. *Plaintiff's Exhibit 9* at 63.

Plaintiff's counsel has persuasively and vigorously argued that, on the basis of the facts discussed above, H.K. PORTER was not able to find qualified minority subcontractors because of its in-house assembly in Chicago. *Plaintiff's Exhibit 9* at 82-90 (Closing argument of Mr. Charles Kline before Dr. Dyer); *Plaintiff's Exhibit 15* Hearing before Judge Kehoe December 19, 1979 at

27 (Argument by Mr. Kline that H.K. PORTER made a calculated risk and decided it would be cheaper to fabricate the entire product in-house except for a handful of raw materials); *Plaintiff's Exhibit 16* Hearing before Judge Kehoe December 20, 1979 at 29 (Mr. Kline's argument that PORTER's high fixed-cost for the Chicago plant placed it at a disadvantage for subcontracting compared to a firm without a plant and overhead). *Transcript of Hearing* November 7, 1984 (Docket # 88) at 47-51 (Mr. Kline's argument that commercially impossible for PORTER to subcontract fabricator process and no qualified minorities available for transport of raw materials). *Cf. Plaintiff's Exhibit 10* (high percentage of minorities in Plaintiff's Chicago plant).

IV. H.K. PORTER NOT IN COMPLIANCE WITH CONTRACT'S ESCAPE MECHANISM

On the mixed question of law and fact regarding H.K. PORTER's compliance with ¶ C(2) of the escape provision,[5] the Court concludes that PORTER made a calculated risk investing in its in-house facility which made it difficult for PORTER to sub-contract out part of the work for Contract Y-621. However, the Court does not find that PORTER's in-house facility made PORTER unable to achieve the state 5% goal because "minority contractors were not qualified or were unavailable." Rather, PORTER's business decisions made it commercially unfeasible for PORTER to subcontract. Even accepting PORTER's contention that it could not subcontract even 5% to minorities, the Court does not believe DADE COUNTY was compelled to find PORTER in compliance simply because of PORTER's

internal business structure. It is not this Court's function to rewrite Contract Y-621 and strike the MBE provision or to excuse PORTER from its effect because of PORTER's excellent record of minority employment at its plants and that the particular plant in Chicago employed 33 workers, all of whom were minorities. There is no general constitutionally-compelled property right to government contracts which would have required DADE COUNTY to accommodate the internal business structure of one of the bidders for a contract. *Cf. Economic Development Corporation of Dade County v. Stierheim*, ____ F.2d ____ (11th Cir. 1986) (decided February 20, 1986) (Contractor's contract with county to distribute federal funds not property interest within the meaning of XIV Amendment). This Court agrees with the determination that H.K. PORTER was not in compliance with the Minority Business Enterprise requirement made by six previous levels of review—the Compliance Monitor, the Contracting Officer, the Urban Mass Transportation Administration's Atlanta regional office and UMTA's Washington office, the Dade County Commission, and United States District Judge Kehoe. *See, e.g., Defendant's Exhibit 2* (letters from Mr. Williams and Mr. Richardson); *Memorandum Order of Judge Kehoe* (December 28, 1979).

Therefore, DADE COUNTY had the right to choose the $8.3 million bidder, Transit Products, Inc., over the $8.1 million bidder H.K. PORTER. Transit Products designated in advance, as required, minority business enterprise subcontractors in its initial bid, unlike H.K. PORTER. *See Plaintiff's Exhibit # 3* (Transit Products, Inc., bid form, at Appendix B, pp. 11-17). DADE COUNTY made it clear that MBEs listed on the bid

form were only "proposed" or "initial" minority firms until investigated. *See Plaintiff's Exhibit 5* at 8 (Compliance Hearing September 5, 1979 before Dr. Corbin). Dr. Corbin expressed considerable skepticism about the genuineness of Intransco as a minority enterprise at the compliance hearing on Contract Y-621 within two weeks of the opening of the bid. *See Plaintiff's Exhibit 5*, at p.9 (Compliance Hearing September 5, 1979). H.K. PORTER's tactic in this case has been to put Intransco on trial. The matter of Intransco is as irrelevant to these cross-motions for summary judgment on liability as the subsequent follow-through by DADE COUNTY in enforcing the MBE goal upon Transit Products. Instead, Transit Products, Inc.'s willingness to abide by the 5% goal, and its willingness to substitute Intransco with another firm to comply with the contract, is the matter which is truly relevant to Defendant's liability.

Transit Products steadfastly has maintained that they would comply with the MBE requirement, even if it meant that Intransco would be substituted with another firm. On September 5, 1979, at the Compliance Hearing before Dr. James Corbin, Director of Equal Employment Opportunity, the following exchange took place between Dr. Corbin on the one side and on the other side Mr. Hugh M. Mize, Jr. and D.G. Thomson, respectively, President and Vice-President of Transit Products, Inc.

> Dr. Corbin: Are you prepared to make that substitution [if Intransco is found not to be a minority firm] after being instructed by us?

Mr. Thomson: I think we might have some difficulty getting the technology, but I am convinced we can put it together.

Dr. Corbin: So, your answer to whether or not you are prepared to make a substitution is . . .

Mr. Mize: Yes. We prefer not to. We hope these people qualify.

Plaintiff's Exhibit 5 at 8.

On December 7, 1979, the following exchange took place between Dr. John Dyer, Contracting Officer and Transit Product's President, Mr. Mize:

Dr. Dyer: You said, in effect, that in the event there were problems with Intransco in terms of it being legitimately a minority business enterprise, you, one, would be willing to substitute and, two, you felt confident you could substitute.

Mr. Mize: That's correct.

Plaintiff's Exhibit 11 at 8.

This contract award to Transit Products was under continual scrutiny during 1979 by the legislative and executive political branches of the local government—The Dade County Commission and the administrative mass transit agency—as well as the federal executive branch (The UMTA) and the federal judicial branch

(United States District Court). Again, the position of H.K. PORTER has remained consistent since August 1979—adamantly insisting that no minority subcontractors existed, while Transit Products listed minority businesses in its bid proposal and indicated willingness to substitute another MBE, should Intransco be found not to be a legitimate minority business enterprise. Therefore, the decision to award Metrorail Contract Y-621 to Transit Products was valid, if the MBE provision was valid.

The final question is whether the MBE requirement itself was constitutional. UMTA Circular 1165.1, effective March 1, 1978 (more than one year before the contract in question) cited eight separate sources of authority for the MBE goal: (1) Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000 d-1; (2) Section 12(f) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1608(f); (3) 49 C.F.R. Part 21; (4) 28 C.F.R. Part 42, Subpart F; (5) Executive Order 11625 (October 13, 1971); (6) Department of Transportation Order 4000.7 "Minority Business Enterprise Program" (March 26, 1975); (7) Department of Transportation Order 1000.12 "Implementation of the Department of Transportation's Title VI Program" (January 19, 1977); and (8) Federal Management Circular 74-7 "Uniform Administration Requirements for Grants-in-Aid to State and Local Governments" (September 13, 1974). *See Plaintiff's Exhibit 8* Urban Mass Transportation Administration Circular 1165.1 "MBE Policy and Requirements for Grant Recipients" at page 1-2. The Court will now turn to the question of whether the 5% minority goal in Contract Y-621 was unconstitutional or otherwise illegal.

V. CONCLUSIONS OF LAW

The minority business enterprise goals at issue in this litigation were mandated by the federal government as a condition of its participating in financing 80% of Metrorail's construction costs. The Urban Mass Transportation Act, 49 U.S.C. App. §§1601-1618 refers to Title VI of the 1964 Civil Rights Act[6] in prohibiting discrimination "under any project, program or activity funded in whole or part through financial assistance" under the Urban Mass Transportation Act. 49 U.S.C. App. §1615(a)(1). Metrorail was such a project funded by the federal government under the Urban Mass Transportation Act. The Congress gave the Secretary of Transportation the responsibility to take affirmative action to assure compliance with subsection (a)(1) of the Act. 49 U.S.C. §1615(a)(2) ("The Secretary *shall* take affirmative action to ensure compliance"). Pursuant to the federal requirements, DADE COUNTY's bid invitation for the Metrorail contract at issue included Addendum 3 (the 5% minority business enterprise goal) in response to the Secretary of Transportation's Order 4007.7A and the Urban Mass Transportation Administration's Circular 1165.1. The Court declines to find the provisions in the Act unconstitutional, nor does the Court find the Secretary's order unconstitutional, or DADE COUNTY's contract addendum facially unconstitutional. In light of Congress' determination that minorities were not fully participating in public contracts at the federal, state, and local level, Congress had the power to remedy the effects of past discrimination. DADE COUNTY's modest 5% minority business enterprise goal—not quota—for the Metrorail contract was a valid implementation of Congressional policy.

In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the Supreme Court upheld a minority business enterprise provision of the Public Works Employment Act of 1977, 42 U.S.C. §§6701-6736, which required at least 10% of any local public works project to be set aside for minority business enterprises. As Defendants correctly note, the 5% minority business enterprise goal provision at issue in this case is less burdensome than the 10% minority business enterprise quota upheld against constitutional challenge in *Fullilove*. Further, the minority business enterprise goal is not a strict quota of the sort found violative of Title VI of the 1964 Civil Rights Act and the Equal Protection Clause of the Constitution by the Supreme Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

The Metrorail contract allowed for a waiver of the 5% minority business enterprise goal, a provision that amounted to an escape mechanism by which H.K. PORTER could justify its inability to meet the 5% goal. At the hearing conducted by JOHN A. DYER, the transportation authority concluded that Plaintiff was not in compliance with the bid invitation's minority contractor participation provisions. H.K. PORTER failed to contact a single minority business in the course of preparing its bid, seeking to justify its inaction by asserting that there were no minority businesses in existence which could perform any portion of the contract work. H.K. PORTER's bid was rejected, and upon administrative review by the Department of Transportation's Urban Mass Transportation Administration, Carl B. Richardson, Acting Director, wrote a letter dated December 17, 1979 to Defendant DYER concurring in the award of the Metrorail contract

to the second lowest bidder, Transit Products, Inc. *See Defendants' Composite Exhibit 2.*

The Court has reviewed the transcript of the hearing and concludes, as did Judge Kehoe nearly six years ago, that the hearing complied with constitutional due process requirements. H.K. PORTER presented its claim that one of the two proposed minority contractors in Transit Products' bid (Intransco) was not a true minority contractor, yet could not explain away its own total non-compliance.[7]

Defendant DYER's refusal to waive the 5% minority business enterprise goal is justified on these facts, particularly in light of the second-lowest bidder's ability to find minority-owned subcontractors. DYER's actions did not violate Florida administrative law, due process, nor were they arbitrary or capricious. *See South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County*, 723 F.2d 846, 850 (11th Cir. 1984)[8] (Pendent Florida due process and equal protection claims judged constitutional claims because Florida Supreme Court has held tht Florida's due process and equal protection guarantees confer the same protection as their federal counterparts).

Therefore, H.K. PORTER was not entitled to receive the Metrorail contract in question, nor were Plaintiff's legal rights violated by DADE COUNTY when the Defendant awarded the contract to another business. Defendants' motion for summary judgment is granted on the basis that Defendants are not liable to Plaintiff for any alleged damages resulting from the award of Contract Y-621.

DONE AND ORDERED in Chambers at Miami, Florida this 8th day of May, 1986.

/s/ Edward B. Davis
UNITED STATES DISTRICT JUDGE

cc: Charles C. Kline, esq.
Robert A. Cuevas, Jr.

FOOTNOTES

[1] Addendum 3 provides in pertinent part that a bidder was required to *either*:

> (a) involve minority business enterprises (MBE's) in five percent of the contract work; or
>
> (b) demonstrate that:
>
> > "1. it has made every reasonable effort to contact and negotiate with Minority Contractors in an attempt to subcontract work including every reasonable effort to select the portions of the work proposed to be subcontracted, in order to achieve the stated goal;
> >
> > 2. it was unable, notwithstanding such efforts, to achieve the stated goal because Minority Contractors were not qualified or were Unavailable; and . . .". (Section IIIC of Appendix B p. 4, Plaintiff's Exhibit 1F, admitted in evidence October 19, 1979).

MDC had promulgated this provision in response to DOT's Secretary Order 4000.7A and UMTA's Circular 1165.1 which sought to clarify DOT's MBE's policy and requirements for UMTA grant recipients. An MBE was defined as:

> a business enterprise that is owned and controlled by one or more socially or economically disadvantaged persons. Such disadvantage may arise from cultural, racial, chronic economic circumstances or background, or other similar cause. Such persons would include, but not be limited to, Blacks (not of Hispanic origin); Hispanics; Asians or Pacific-Islanders; American Indians or Alaskan Natives; and women, regardless of race or ethnicity.

(Footnote by Court of Appeals)

[2]Porter Co.'s preliminary injunction motion was not ruled on by Judge King; however, Porter Co. was granted a summary judgment which provided essentially the same relief sought by the injunction. (Footnote by Court of Appeals)

[3]He specifically found (1) Porter Co. failed to make every reasonable effort to contact and negotiate with MBE's other than by telephoning and corresponding with its already existing suppliers, (2) Porter Co.'s argument that no capable MBE's existed was refuted by Transit's bid submission and (3) Porter Co. failed to identify MBE's it intended to utilize prior to submission of its bid as required. (Footnote by Court of Appeals)

[4]Because Judge King was unavailable to hear Porter Co.'s second motion for an emergency TRO, the case was reassigned to Judge Kehoe who made the order that is the subject of this appeal. (Footnote by Court of Appeals)

[5]The Court has previously found provision C(1) and C(3) not applicable to the facts of this case. *See supra* at 16-17.

[6]Title VI of the Civil Rights Act of 1964 states, "No person, in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

[7]Intransco was replaced as a supplier for the Metrorail contract by the firm of Tepcon, Inc., when James D. Corbin, Director of the Equal Opportunity Division for the Defendant, concluded that Intransco was not a legitimate minority business enterprise on December 18, 1979. The contract was completed with subcontract awarded to two minority business enterprises—Shield Electric

Company and Tepcon, Inc.—despite Plaintiff's claim that no minority firms were available to do the subcontracting work. The total amount of the minority business enterprise subcontracts amounted to $424,998.40 ($54,998.40 to Shield and $370,000.00 to Tepcon), an amount slightly in excess of the Defendants' 5% minority business enterprise goal.

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[8]The Eleventh Circuit, in *Associated Contractors*, upheld a waiver of the competitive bidding process to allow bidding among black contractors for the Earlington Heights Metrorail station. The Court upheld a 100% black set-aside and 50% black subcontractor goal. The contract bid invitation in *Associated Contractor* was far more burdensome than the 5% minority goal at issue in this case and demonstrates the lack of merit of Plaintiff's claims in this Circuit. Furthermore, *Associated Contractors* dealt with the Defendants' powers as a county under state law. In this case, the Defendant is in even a stronger legal position because it has acted pursuant to Congressional and Executive authority.

Plaintiff argues that the County was required to make a detailed finding of past discrimination before awarding Contract Y-621, with its 5% minority business enterprise requirement, using the three-factor test in *Associated Contractors* at 851-852. Plaintiff's argument fails because the "proper governmental body" with the authority to pass the legislation in question which lead to the MBE provision in Contract Y-621, was Congress as implemented by the federal executive branch. *Associated Contractors* tested the authority of Dade County's commission to pass an ordinance. In *Associated Contractors*, the Eleventh Circuit added to the unbroken string of decisions affirming the power of Dade County to remedy discrimination by approving 100% minority set-aside contract. *See also generally J.A. Croson Company v. City of Richmond*, 779 F.2d 181 (4th Cir. 1985) (recent 4th Circuit case relying on *Associated Contractors* to uphold city's power to legislate 30% minority set-aside for public contracts). Neither Congress, nor state and local government, are constitutionally required to make separate, lengthy, independent investigations of discrimination before requesting bids on each of the thousands of contracts made each year involving federal funds and containing goals for minority participation.

[1355]

J.A. CROSON COMPANY, Appellant,

v.

CITY OF RICHMOND, Appellee,

Associated General Contractors of America,
Amicus Curiae.

J.A. CROSON COMPANY, Appellee,

v.

CITY OF RICHMOND, Appellant,

Associated General Contractors of America,
Amicus Curiae.

Nos. 85-1002, 85-1041.

United States Court of Appeals, Fourth Circuit.

July 9, 1987.
Rehearing and Rehearing En Banc
Denied Sept. 18, 1987.

Contractor whose bid had been nullified filed action for injunction, declaratory [1356] relief, and damages, challenging city's minority business utilization plan for public contracts. The United States District Court for the Eastern District of Virginia, Robert R. Merhige, Jr., J., ruled in favor of city. Contractor appealed. The Court of Appeals, 779 F.2d 181, affirmed. The Supreme Court,

106 S.Ct. 3327, remanded. The Court of Appeals, Wilkinson, Circuit Judge, held that city plan, which required contractors on city construction projects to subcontract at least 30% of dollar value of contract to minority-owned business enterprises unless city waived requirement, violated equal protection clause.

Reversed and remanded.

Sprouse, Circuit Judge, filed a dissenting opinion and would have granted rehearing.

1. Civil Rights —3

To show that a municipal plan is justified by compelling governmental interests, municipality that wishes to employ racial preference cannot rest on broad-brush assumptions of historical discrimination.

2. Constitutional Law —215.2

Municipal Corporations —356

City's minority business utilization plan, which required contractors on city construction projects to subcontract at least 30% of dollar value of contract to minority-owned business enterprises unless city waived requirement, violated equal protection clause; there was no showing of past discrimination against minority firms, such as was necessary to permit racial preference to stand. U.S.C.A. Const. Amend. 14.

3. Municipal Corporations —356

Even assuming the city's minority business utilization plan, which required contractors on city construction projects to subcontract at least 30% of dollar value of contract to minority-owned business enterprises unless city waived requirement, was justified by need to remedy prior discrimination, plan was invalid because it was not narrowly tailored to that remedial goal. U.S.C.A. Const.Amend. 14.

Walter H. Ryland (Williams, Mullen & Christian, Richmond, Va., on brief), for appellant/cross-appellee.

Reginald M. Barley, Sr. Asst. City Atty. (Michael L. Sarahan, Asst. City Atty., Richmond, Va., on brief), for appellee/cross-appellant.

Michael E. Kennedy, McLean, Va., for amicus curiae.

Before HALL, SPROUSE, and WILKINSON, Circuit Judges.

WILKINSON, Circuit Judge:

This case is now before us on remand from the Supreme Court. It involves a challenge to the Minority Business Utilization Plan enacted by the City Council of Richmond, Virginia. The plan requires contractors on city construction projects to subcontract at least thirty percent of the dollar value of the contract to minority-owned business enterprises (MBE's) unless the city waives the requirement. This court earlier upheld

the plan under Virginia law and the federal Constitution.

The Supreme Court granted certiorari, vacated the judgment, and remanded the case for consideration in light of *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986). We now hold that the Richmond plan is invalid under the Equal Protection Clause of the Fourteenth Amendment.

I.

The Minority Business Utilization Plan, enacted in April of 1983, sets aside part of the city's construction expenditures for minority-owned businesses. The plan terminates in 1988, at which time the City Council can renew it or allow it to lapse. Under the plan, the prime contractor must subcontract at least thirty percent of the dollar value of the contract to firms that are at least one-half minority owned. Every construction contract includes provisions setting out the MBE requirement and the procedures for complying with it. The contract provisions state that if a contractor fails to meet the MBE requirement, the [1357] contract "shall be suspended or terminated unless a waiver is granted." They further state that the city will not waive the requirement "other than in exceptional circumstances." Only non-minority prime contractors must comply with the plan provisions.

In September of 1983, the city invited bids for the installation of stainless steel urinals and water closets at the City Jail. The J.A. Croson Co., which is not itself an MBE, was the only bidder on the contract. After Croson submitted its bid for the project, it requested a

waiver of the MBE requirement. Croson contended that it was unable to locate any minority subcontractors, except one that it considered unqualified. The city refused to grant a waiver. Croson then informed the city that if it were required to use the unqualified contractor, the cost of the project would rise by $7,663.16, and the contract price would have to rise accordingly. The city again turned Croson down, stating that the minority contractor was qualified and that the fixed price bid could not be increased.

Shortly thereafter, the city informed Croson that it had decided to re-bid the project. Croson was invited to submit a new bid. Croson then sued in federal district court, arguing that the plan's racial set-aside was contrary to Virginia law governing competitive bid procedures and that it violated the federal Constitution. Croson brought its federal claims under 42 U.S.C. §§ 1981 and 1983.

The district court ruled that the plan was consistent with both Virginia law and federal law. A divided panel of this court affirmed. *J.A. Croson Co. v. City of Richmond*, 779 F.2d 181 (4th Cir.1985). After this court announced its decision, the Supreme Court decided *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986). The Supreme Court granted certiorari in the *Croson* case and remanded it to us for further consideration in light of *Wygant*. *See* ___ U.S. ___, 106 S.Ct. 3327, 92 L.Ed.2d 733 (1986).

Wygant involved a challenge to a preferential layoff provision in a collective bargaining agreement for school teachers. The agreement stated that if the Board of

Education needed to lay off any teachers, those with the most seniority would be protected, "except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff." 106 S.Ct. at 1845. The Court upheld this provision unconstitutional, principally because the racial preference was not justified by adequate findings of prior discrimination and because it was not narrowly tailored to its asserted remedial purpose.

After reconsidering our decision in light of *Wygant*, we conclude that we must invalidate the racial preference in the Richmond plan. The very infirmities which marked the preferential provision in *Wygant* are present in this case.

II.

[1] Because the views of the majority in *Wygant* were expressed in a plurality opinion and two concurrences, the boundaries of *Wygant* will no doubt be a matter of dispute.[1] There should be no dispute, however, about the core of its holding: To show that a plan is justified by a compelling governmental interest,

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[1]Unless otherwise noted, the references to *Wygant* herein refer to the plurality opinion. The plurality opinion of Justice Powell was joined by Chief Justice Burger and Justice Rehnquist; it was also joined in part by Justice O'Connor, who wrote separately. Justice White concurred in the judgment and wrote separately.

Our analysis of the Richmond plan comports, we believe, with the views expressed in all three opinions. Although Justice White did not elaborate in *Wygant* on the requirements of particularized findings and narrowly tailored means, he certainly did not indicate

a municipality that wishes to employ a racial preference cannot rest on broad-brush assumptions of historical discrimination. Yet that is exactly what the Richmond City Council did in this case. If this plan is held to be valid, [1358] then local governments will be free to adopt sweeping racial preferences at their pleasure, whether those preferences are legitimate remedial measures or bald dispensations of public funds and employment based on the politics of race. It is precisely to guard against this latter abuse that the *Wygant* requirement of particularized findings is essential.

A.

According to the *Wygant* plurality, before an asserted governmental interest in a racial preference can be accepted as "compelling," there must be findings of prior discrimination. Findings of *societal* discrimination will not suffice; the findings must concern "prior discrimination *by the government unit involved*" (emphasis added). *Wygant*, 106 S.Ct. at 1847. Moreover, if this finding is to be drawn from mere statistical evidence, that evidence cannot just show a disparity between the percentage of minorities in some activity (e.g., employment in public schools or awarding of public contracts) and the percentage of minorities in the community. It must instead focus on the population that is relevant for comparative purposes, such as the percentage of minorities in the local labor force or the

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(Footnote 1 Continued)

that he would permit localities greater latitude in this regard than Justices Powell and O'Connor. Of critical importance is the fact that five Justices concurred in the judgment that the racial preference in *Wygant* was unconstitutional.

construction business. *Id.* at 1847-48; *see also Johnson v. Transportation Agency, Santa Clara County*, ___ U.S. ___, 107 S.Ct. 1442, 1452, 94 L.Ed.2d 615 (1987); *Hazelwood School District v. United States*, 433 U.S. 299, 308 & n. 13, 97 S.Ct. 2736, 2742 & n. 13, 53 L.Ed.2d 768 (1977).[2]

The Supreme Court in *United States v. Paradise*, ___ U.S. ___, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) and *Local 28 of Sheet Metal Workers v. EEOC*, ___ U.S. ___, 106 S.Ct. 3019, 92 L.Ed2d 344 (1986), reemphasized this need for a suitable basis for remedial action. In both of these cases, the Court upheld race-conscious relief imposed by district courts where the offending institutions had a history of discriminatory conduct. In *Paradise*, for example, the Court reviewed that institutional history in painstaking detail, noted the "four decades" during which blacks had suffered total exclusion from all positions in the Alabama Department of Public Safety, and concluded that the "pervasive, systematic, and obstinate discriminatory conduct of the Department" justified the race-conscious relief ordered by the district court. 107 S.Ct. at 1065 (opinion of Brennan, J.). While *Wygant* involved voluntary action and *Paradise* and *Sheet Metal Workers* involved court-ordered remedies, there was in all those cases a substantial basis for believing that remedial action was required.

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[2]The Supreme Court's decision in *Johnson, supra*, does not alter *Wygant's* requirement of a showing of prior discrimination. The *Johnson* Court addressed only a Title VII claim, not a Fourteenth Amendment claim such as the one now before us. The Court stated that if a Fourteenth Amendment claim were before it in *Johnson*, the *Wygant* standard would come into play. 107 S.Ct. at 1446 n. 2; *id.* at 1449-50 n. 6.

[2] Here, by contrast, proceedings before the City Council failed to establish the basis for remedial action. The debate, at the very end of a five-hour council meeting, revealed no record of prior discrimination by the city in awarding public contracts, aside from some conclusory and highly general statements made by a member of the public, a City Council member who supported the plan, and the City Manager. The member of the public who testified about discrimination was not even involved in the construction industry. The City Manager's comments mainly had to do with the city of Pittsburgh. Such meager evidence is not a sufficient finding of prior discrimination. The proceedings betray the very casualness about the use of racial distinction in public enactments that *Wygant* warned against.

The only other evidence purporting to show discrimination in the assignment of contracts compared the percentage of minority contracts with the total number of minority residents in the community. Statistical records were said to indicate that minorities comprised 50% of Richmond's population but that minority-owned firms had received only 0.67% of the dollar value of Richmond's prime contracts. General [1359] population statistics suggest, if anything, more of a political than a remedial basis for the racial preference. According to the plurality in *Wygant*, this is exactly the kind of evidence that will not pass muster.

The appropriate comparison is between the number of minority contracts and the number of minority *contractors*, taking into account other relevant variables such as experience and specialties. Showing that a small fraction of city contracts went to minority firms, therefore, does not itself demonstrate discrimination;

both sides agree that the number of minority-owned contractors in Richmond was also quite small. *Wygant* rejected a similar comparison in an employment context:

> There are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind. In fact, there is no apparent connection between the two groups. Nevertheless, the District Court combined irrelevant comparisons between these two groups with an indisputable statement that there has been societal discrimination, and upheld state action predicated upon racial classifications.

106 S.Ct. at 1838.

Our holding today is likewise consistent with that of the Sixth Circuit in *J. Edinger & Son, Inc. v. City of Louisville*, 802 F.2d 213 (6th Cir.1986). In *Edinger*, the city of Louisville enacted a program to grant preferential treatment to racial minorities, women, and the handicapped in awarding its supply and service contracts. There, as in the present case, the need for the program was justified principally by general population statistics. Because general population statistics failed to address the "statistical disparity between the percentage of qualified minority business contractors doing business in Jefferson County and the percentage of bid funds awarded to those businesses," the Sixth Circuit found that the program did not comport with *Wygant*, 802 F.2d at 216. *Accord Associated General*

Contractors of California v. San Francisco, 813 F.2d 922 (9th Cir.1987).

We do not suggest that the City Council should be held to as high a standard in its factfinding as, say, a federal district court. Justice O'Connor, in her concurrence in *Wygant*, identified the problems with requiring an extended *mea culpa* from localities seeking to eliminate a historical pattern of discriminatory practice. Legislative findings are, moreover, different from judicial ones; the City Council need not have produced formal, contemporaneous findings, so long as it had "a firm basis for believing that remedial action is required." *Wygant*, 106 S.Ct. at 1853 (O'Connor, J., concurring in part and concurring in the judgment).

In this case, however, the city has failed to show such a firm basis, either contemporaneously or at the district court level. The able trial judge could not point to any evidence beyond that relied upon by the City Council—namely, the spurious statistical comparison and the nearly weightless testimony. We cannot uphold the plan based on this evidence, nor would it be proper for us to develop a *post hoc* rationale for the city's racial preference.

In sum, the omissions in this case overshadow the evidence. There has been no showing that qualified minority contractors who submitted low bids were passed over. There has been no showing that minority firms were excluded from the bidding pool. *Edinger*, 802 F.2d at 216. There has been no showing—only the loosest sort of inferences—of past discrimination, without which *Wygant* does not permit a racial preference to stand.

The record in this case suggests that the City Council thought it was permissible simply to adopt the contract set-aside program upheld by the Supreme Court in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980). Much of the discussion in the hearings was apparently based on that premise, and some aspects of the Richmond plan follow the *Fullilove* set-aside to the letter. If the City Council did rely on that premise, it was in error. National findings do not alone establish the need for action in a particular locality. If they did, the *Wygant* Court's rejection of [1360] societal discrimination as a basis for remedial action would be undercut. For a locality to show that it enacted a racial preference as a remedial measure, it must have had a firm basis for believing that such action was required based on prior discrimination by the locality itself. The Court upheld the set-aside in *Fullilove* based on Congress's well-founded belief that such a program was needed at the federal level; the Court emphasized the special competence of Congress to act on such a finding. 448 U.S. at 483, 100 S.Ct. at 2777; 448 U.S. at 499-502, 100 S.Ct. at 2785-87 (Powell, J., concurring). Localities cannot disregard the line between remedial measures and political transfers by adopting the *Fullilove* program as though it were boilerplate.

B.

The record of prior discrimination supporting the Richmond plan is deficient. Its deficiency is made more clear by comparison with plans considered in other circuits. For example, in *Valentine v. Smith*, 654 F.2d 503 (8th Cir.1981), the record of prior discrimination supporting the racial preferences included reviews by

the Office of Civil Rights of the Department of Health, Education, and Welfare (HEW) and also a successful Title VI suit in federal district court. A similar record supported the preference in *Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894 (3d Cir.1984).

In *Associated General Contractors v. Metropolitan Dade County*, 723 F.2d 846 (11th Cir.1984), the locality had "reliable, substantial information compiled by independent investigations" that showed "*identified discrimination* against Dade County black contractors. . . ." *Id.* at 853 (emphasis in original). The court in *Ohio Contractors Assoc. v. Keip*, 713 F.2d 167 (6th Cir. 1983), found that the state's racial preference was a remedial measure partly because the legislators

> were informed of the findings of racial discrimination in state contracting made in connection with an earlier joint resolution of the legislature and the contents of the report of a special 'task force' established by the state attorney general which found a severe numerical imbalance in the amount of business the state did with minority groups.

Id. at 171. The court went on to describe various studies comparing the volume of minority contracts with the number of minority *businesses*, rather than the minority population as a whole.

Finally, in *Fullilove*, the Supreme Court noted that Congress's decision to enact a minority set-aside for federal contracts was supported by reports of congressional committees, the U.S. Civil Rights Commission, and the General Accounting Office. *See*

448 U.S. at 465-67, 100 S.Ct. at 2768-69; *id.* at 503-06, 100 S.Ct. at 2787-89 (Opinion of Powell, J.).

Of course, we do not intimate any view on the adequacy of the plans described in *Valentine, Kromnick, Associated General Contractors*, and *Ohio Contractors*. These cases were all decided prior to the *Wygant* decision. We note only that the support offered for the Richmond plan is extremely weak in comparison. The plan was not supported by any impartial report, any meaningful statistical evidence, or even by anecdotal allegations of prior discrimination. Based on such a record, we cannot uphold the plan as a remedial measure under *Wygant*. If this plan is supported by a compelling governmental interest, then so is every other plan that has been enacted in the past or that will be enacted in the future.

III.

[3] Even if we accepted that the Richmond racial set-aside was justified by a need to remedy prior discrimination, the plan still fails because it is not narrowly tailored to that remedial goal. It is of central importance to equal protection under law that public distinctions between citizens on the basis of their race be narrowly and specifically framed. *Wygant*, 106 S.Ct. at 1849-50. The thirty percent quota was chosen arbitrarily; it was not tied, for example, to a showing that thirty percent of Richmond subcontractors are minority-owned. The figure simply emerged from the mists. The combination [1361] of a large set-aside and a small number of actual minority beneficiaries presents a special potential for abuse. As such, it imposes an

overbroad competitive burden on non-minority businesses.

The competitive disadvantage is far greater than the thirty percent minimum set-aside suggests. In many construction contracts, the dollar allocation among subcontractors will not break into a thirty percent block. If, for example, a project required three subcontractors whose respective efforts represented 55, 25, and 20 percent of the total project cost, compliance with the Richmond ordinance could come only by awarding 55 or 45 percent of the total dollar amount to racially preferred businesses. In this case, the supply of plumbing fixtures represented 75 percent of the cost of the total project, an amount Croson was obliged to award to a minority enterprise in order to meet the minimum 30 percent set-aside. Such means "unnecessarily trammel the rights of innocent individuals directly and adversely affected by a plan's racial preference." *Wygant*, 106 S.Ct. at 1854 (Opinion of O'Connor, J.). The disadvantage is further compounded by the fact that minority prime contractors are exempt from the higher construction costs often imposed by the MBE subcontract set-aside while non-minority primes are subject to them. Richmond City Code, Ch. 24.1, Art. VIII-A(A).

In addition, the definition of minority-owned business is itself not narrowly tailored to the remedying of past discrimination. The Richmond plan defines "minority group members" as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." This definition nearly duplicates the definition that drew fire in *Wygant:*

> The Board's definition of minority to include blacks, Orientals, American Indians, and persons of Spanish descent . . . further illustrates the undifferentiated nature of the plan. There is no explanation of why the Board chose to favor these particular minorities or how in fact members of some of the categories can be identified. Moreover, respondents have never suggested—much less formally found—that they have engaged in prior, purposeful discrimination against members of each of these minority groups.

106 S.Ct. at 1852 n. 13.

The same aggregation problem is present in the Richmond plan. A record of prior discrimination against blacks by a governmental unit would not justify a remedial plan that also favors other minority races. The need for this kind of narrow tailoring, like the need for findings of past discrimination, arises because the governmental unit enacting a racial preference must limit itself to remedying past discriminatory practices.

Finally, as was noted by the prior opinion in this case, the presence of an expiration date and a waiver provision may help to narrow the scope of a plan's operation. *Croson*, 779 F.2d at 191. Those features cannot, however, salvage an ordinance which otherwise transgresses *Wygant's* standards. Whether the Richmond plan will be retired or renewed in 1988 is, at this point, nothing more than speculation. Nor does the waiver here cure the constitutional defects defined by the *Wygant* decision. The waiver is to be granted "only in exceptional circumstances" and as a matter of

administrative discretion. The burden of obtaining the waiver rests at all times upon the prime contractor who must demonstrate the unavailability or the unwillingness of racially preferred enterprises to participate in the contract project. *See Croson*, Appendix B, 779 F.2d at 179-80. We doubt that any waiver, let alone the restrictive provisions of the waiver in this case, could cure the objectionable aspects of the Richmond ordinance.

Although this case presents a Fourteenth Amendment claim rather than a Title VII claim, the Supreme Court's recent pronouncement on Title VII in *Johnson, supra*, is still instructive. The Court may have adopted a different standard for evaluating challenges to plans under Title VII than under the Fourteenth Amendment, but it has insisted in both contexts that remedial efforts must ensure fair treatment [1362] of whites and blacks, males and females. The Court stressed in *Johnson* that the Agency plan permitted competition among qualified aspirants, 107 S.Ct. at 1455; the Richmond plan, by contrast, aims to stifle competition in the interest of a rigid set-aside. The plan upheld in *Johnson* made race or gender "but one of numerous factors" considered by the government agency in its employment decisions. *Id.* The race or gender of an applicant was merely a "plus"; no rigid quotas or set-asides were used. The Court characterized the program as a "moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force." *Id.* at 1457. None of the factors emphasized by the Court in *Johnson* apply to Richmond's plan, which features the combination of an inadequate foundation for remedial action plus a "reflexive

adherence to a numerical standard" which the Supreme Court in *Johson* disavowed. *Id.* at 1455.

IV.

The *Wygant* requirements amounted to more than a trivial hurdle for localities that wish to draw racial distinctions. They are the heart of the Supreme Court's approach to the constitutionality of remedial preferences. Nothing in *Wygant* outlaws all such preferences, and subsequent cases have clarified their reach. *Wygant* does, however, limit racial preferences to what is necessary to redress a practice of past wrongdoing. The Richmond ordinance reflects the most casual deployment of race in the dispensation of public benefits. It prefers some, and in so doing diminishes the rights of all. *Wygant* rejected that approach, and with it the notion that racial distinctions among citizens will ever become the perfunctory reality of public life.

The judgment of the district court is reversed and the case is remanded for a determination of appropriate legal and equitable relief.

REVERSED AND REMANDED.

SPROUSE, Circuit Judge, dissenting:

As the majority notes, the Supreme Court remanded our previous decision for us to consider the constitutionality of the City of Richmond's affirmative action ordinance in light of *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986). In my view the majority both misconstrues and misapplies *Wygant*. In his plurality opinion, Justice

Powell stated that any classification based on race "must be justified by a compelling governmental interest," *id.* at 1846 (plurality opinion) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 1881, 80 L.Ed.2d 421 (1984)), and "the means chosen . . . to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.' " *Id.* (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 480, 100 S.Ct. 2758, 2775, 65 L.Ed.2d 902 (1980)). Four justices in *Wygant* also expressed the view that "societal discrimination" is not a sufficient basis for demonstrating a compelling government interest.[3] I think the Richmond ordinance easily satisfies Justice Powell's two-prong test and, assuming that a majority of the Court eventually will adopt the "societal discrimination" modification, it satisfies the test even as modified.

I.

On April 11, 1983, the Richmond City Council, the legislative body of the City of Richmond, voted six to three to adopt the affirmative action ordinance at issue in this case.[4] It acted in response to information

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[3]The majority correctly states that five Justices concurred in the judgment that the remedy in *Wygant* was unconstitutional. It also properly notes, albeit somewhat implicitly, that Justice White, who provided the crucial fifth vote in the case, did not join in the opinions of either Justice Powell or Justice O'Connor. The majority's assertion, therefore, that the "*Wygant* Court[ ] reject[ed] . . . societal discrimination as a basis for remedial action," At 1359, is misplaced. Only four Justices adopted this position, Justice White did not.

[4]*See generally* Richmond, Va.Code Ch. 24.1, Art. I(F) (Part B) (27.10) (27.20) and Art. VIII-A.

presented at a public hearing held that day [1363] that, among other things, indicated that although minority groups made up fifty percent of the City's population, only two-thirds of one percent of the City's construction contracts from 1978-1983 were awarded to minority businesses. The ordinance required all contractors to whom the City awarded construction contracts to subcontract at least thirty percent of the dollar amount of the contract to minority business enterprises (MBEs) unless the City waived the requirement. The ordinance was expressly remedial, "enacted for the purpose of promoting wider participation by minority business enterprises in the construction of public projects."[5] It automatically expires on June 30, 1988.

During a prolonged debate prior to enacting the ordinance, the Council reviewed the history of public procurement in Richmond.[6] The Council and witnesses had available historical records of city contracting, which showed that minorities, who constituted fifty percent of the City's population, had been awarded over a five-year period only two-thirds of one percent of the

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[5]Richmond, Va.Code Ch. 24.1, Art. VIII-A(C).

[6]At the hearing, the Council heard from: Esther Cooper; Freddie Ray, President of Task Force for Historic Preservation in Minority Communities; Stephen Watts, attorney representing Associated General Contractors of Virginia; Richard Beck, president of a local plumbing contractors' association; Mark Singer, a representative of the electrical contractors' association; Patrick Murphy, American Subcontractors Association; Al Shuman, Professional Estimators Association. During the debate between Council members, those opposed to the ordinance contended it was unfeasible because there were insufficient numbers of minority contractors, because it would inflate contract bids and because it would not be conducive to top

City's contracting business. The debate was sharp, and the issue was well defined. Unchallenged statements of council members demonstrated that the ordinance was designed to serve a remedial purpose. One councilman observed that the Council had "reviewed the history of the construction contracts" and structured the proposed ordinance in accordance with federal law (presumably the statute interpreted by the Supreme Court in *Fullilove*). Another councilman stated:

> And I can say without equivocation, that the general conduct in the construction industry in this area, and the State and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread.
>
> I think the situation involved in the City of Richmond is the same, and I would like to give the Clerk a copy of the listings of the contracts for the past five years awarded by the City of Richmond. Contracts totalling over 124 million dollars. And less than one percent were given—were awarded to minorities. I think the question of whether or not remedial action is required is not open to question.

(Footnote 6 Continued)

quality work. Council members favoring the ordinance emphasized the history of discrimination in the construction industry, the current difficulties encountered by MBEs in the Richmond area, and the success of similar set-aside programs in other parts of the country. *Hearing on Adoption of Minority Business Utilization Plan*, Richmond City Council, April 11, 1983.

A city councilman and the city manager further urged that the construction industry discriminated against persons on the basis of race, both in the city of Richmond and the state of Virginia. A number of contracting association representatives took part in the hearing, and none denied this claim—although several asserted that their own organizations did not discriminate on the basis of race.[7] Proponents of [1364] the ordinance asserted that this discrimination was parallel to and part of the discrimination that currently existed in the nation's construction industry.[8] Likewise, opposing witnesses and council members did not deny this assertion. As noted, after the debate ended the Council approved the "set-aside" ordinance by a vote of six to three.

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[7]One of the contractor representatives speaking in opposition to the bill cited statistics to the effect that, of the construction contractors in the United States, only 4.7% were minority contractors and 41% of that figure were located in five states. The balance were scattered among the other 45 states, including Virginia. In other words, in a 45-state area (including Virginia) only 2.8% of the contractors were minorities. The spokesman for the general contractors of Virginia testified that there were 600 contractors in the state association and 130 in Richmond. None were black. Other witnesses testified that none of the 150 Virginia plumbing, heating and cooler contractors were black; that three of the 200 electrical contractors in the state were black; that none of the 150 to 200 Virginia members of the American Subcontractors Association were black; that one of 60 members of the central Virginia contractors association was black; and that one of 45 professional estimators in the Richmond association was black.

[8]The Supreme Court in *United Steelworkers of America v. Weber*, 443 U.S. 193, 198 n. 1, 99 S.Ct. 2721, 2725 n. 1, 61 L.Ed.2d 480 (1979), noted that: "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice."

II.

A.

In the majority's view, the Council totally failed to establish prior discrimination in the awarding of public construction contracts. This is a slippery foundation upon which to build the principal part of its opinion.[9] Assuming, however, a requirement that lacked majority support in *Wygant,* I am persuaded that the Richmond Council had a firm basis for believing it had engaged in past discrimination in awarding public contracts.

Initially, it is essential that we keep our appellate task in the proper perspective. We are not reviewing findings of fact and, as the majority concedes, we do not review the Council's actions under the same criteria by which we review judicial decisions. If that were the case, our review would intrude into the local legislative process and impose undue limitations on local policymakers. Here, however, we need only be assured

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[9]It must be emphasized that *Wygant* simply does not mandate "particularized findings" of "prior discrimination *by the government unit involved,*" At 1357 and 1358 (emphasis in original), as a constitutional prerequisite to the validity of a race-conscious remedy for unlawful discrimination. The suggestion that a public entity may never implement such a remedy to redress the effects of discrimination it had not perpetrated is supported only by Justice Powell's opinion for a three-Justice plurality. Even that opinion did not make, in the words of the present majority, "particularized findings . . . [of actual discrimination] essential." *Id.* at 1357. Indeed, a majority of the Court disclaimed any such requirement, *see Wygant,* 106 S.Ct. at 1853 (O'Connor, J., concurring), and only four Justices would expressly require a public actor to document (at minimum) that it "has a firm basis for believing that remedial action is required." *See id.*

that the council members, "who are presumably fully aware both of their duty under federal law to respect the rights of *all* their [contractors] and of their potential liability for failing to do so, act[ed] on the basis of information which g[ave] them a sufficient basis for concluding that remedial action is necessary. . . ." *Wygant*, 106 S.Ct. at 1855-56 (O'Connor, J., concurring). As Chief Justice Burger has observed, "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Fullilove*, 448 U.S. at 478, 100 S.Ct. at 2774 (plurality opinion). The Chief Justice was considering congressional power in a tripartite government context, but his observation also relates to the legislative nature of the proceedings. We should at least give similar deference to the Council's proceedings. Considering the gross disparity between the resources of the City Council of Richmond and the United States Congress, I am convinced that the Council proceeded on a firm basis for believing that its ordinance was necessary to remedy the effects of prior racial discrimination in the awarding of public construction contracts.

The Council was satisfied that the pervasive discrimination existing in the nation's craft unions and construction businesses also existed in Richmond. Minority contractors had received only two-thirds of one percent of city construction contracts between 1978 and 1983, although the minority population of Richmond during this period was approximately fifty percent. The Council was convinced that this disparity resulted from purposeful discrimination against minority contractors.

I would not disagree with the majority's observation that the Council did not make particularized findings of past discrimination.[10] [1365] No one testified, for example, that he had applied for a city contract and was denied it because he was black. However, not only is such evidence "hard to come by," but municipal legislative proceedings simply are not geared to producing it, even if it is available. Additionally, as Justice O'Connor recognized, the requirement of such a *mea culpa* finding might be fatally counter-productive to the concept of affirmative action.

A statistical showing is not a prerequisite to an affirmative action plan and is particularly inappropriate in situations of this type. There are, for example, one hundred thirty members in the general contractor association of Richmond. None are black. Information developed during the council debate revealed that blacks constitute less than one percent of construction contractors involved in all crafts. The award of two-thirds of one percent of public contracts to an approximately equivalent percentage of qualified minority contractors would hardly establish a statistical prima facie case of discrimination.

It seems inevitable, however, that a proof scheme requiring a comparison of the percentage of contracts

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[10]Under the view held by a majority of the Court in *Wygant*, such findings clearly are not necessary. *See supra* p. 1363, n. 7. In her concurring opinion, Justice O'Connor stated "[t]he imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations." *Wygant*, 106 S.Ct. at 1855 (O'Connor, J., concurring).

awarded with this small qualified pool of minority contractors would ensure the continuation of a systemic *fait accompli*, perpetuating a qualified minority contractor pool that approximates two-thirds of one percent of the overall contractor pool.[11] It is true that in a case amenable to statistical proof, a comparison of the percentage of construction contracts awarded to minority contractors and the percentage of minorities in the general population usually would be probative of "societal discrimination." I suggest, however, that two-thirds of one percent compared to a minority population of fifty percent breaks the bounds of the sometimes suspect "science" of statistics and is probative[1] of a good deal more than general discrimination.

In my view, therefore, not only was the traditional statistical data unavailable, it was not necessary to support the Council's conclusions. The Council, for the reasons I have discussed, had a firm basis for concluding that the remedial ordinance was necessary to cure the ills of past discrimination in awarding public contracts.

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[11]To require such a proof scheme, as does the majority, creates a gross anomaly. To illustrate, assume that in some metropolitan areas, the percentage of qualified minority contractors is approximately equivalent to the percentage of minorities in their general population. An affirmative action plan might be allowed in these areas because there would be a statistical basis to show a discrepancy between the percentage of minorities awarded contracts and the percentage of qualified minority contractors. In contrast, a plan would not survive the proof scheme in areas where discrimination had effectively prohibited the entry of minorities into the contracting business, as in Richmond, because there would be no discrepancy between the two points of comparison. It is anomalous that truly pernicious discrimination could have the compound effect of blocking remedial action.

B.

As I have said, this "firm basis" satisfies the compelling state interest test, even considering the "societal discrimination" limitations that might modify that requirement. Justice Powell in *Wygant* stated

> Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.
>
> * * *
>
> No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over expansive.

Wygant, 106 S.Ct. at 1848 (plurality opinion). Justice Powell expressed this concern against the background of the explicit approval by the circuit court in *Wygant* of [1366] the "role model" and "societal discrimination" bases for the affirmative action plan involved there. In this case, however, there was no suggestion before the Council that the Richmond business community needed a "role model" in the form of highly visible minority contractors performing public work, or even that the minimal presence of minority contractors in that endeavor was caused by such "societal" discriminatory factors as past inferior education or lack of access to social institutions.

The conclusions that emerged from the Council's debate concerned the City's previous discrete discrimination in awarding contracts for public construction projects. However, even if the lack of contracts awarded to minority contractors resulted from both societal discrimination and discrete discrimination in public construction, that fact should not preclude an affirmative action remedy for the latter. The line between "societal" discrimination and discrete discrimination may in fact sometimes be illusory.[12] For example, Justice O'Connor noted that the court of appeals in *Wygant* apparently had assumed "that in the absence of a specific, contemporaneous finding, any discrimination addressed by an affirmative action plan could only be termed 'societal.' " *Wygant,* 106 S.Ct. at 1854 (O'Connor, J., concurring). She emphasized that such an assumption was false. *Id.* Here, "societal discrimination" may have been a force encouraging disparate treatment in many specific areas of human endeavor. The Council, however, was entirely concerned with discrimination discretely directed at minority contractors, not with the general "societal discrimination" that only coincidentally included contractors within its negative sweep.

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[12]A good argument can be made that the converse of Justice Powell's statement is also true—discrimination that is not amorphous cannot merely be labeled "societal discrimination" and dismissed from consideration in establishing affirmative action programs. Lawyer and humanitarian that he is, I cannot believe that Justice Powell meant to dismiss concrete examples of man's inhumanity to man simply because the deprivation was not caused by an identified employer or governmental representative. What is amorphous to one unaffected may be all too painfully clear to one whose livelihood has been adversely affected or whose children cannot receive opportunities equal to their brethren. I do not

III.

I also think the majority completely misses the mark with its conclusion that the ordinance is not narrowly tailored to achieve its remedial goal.[13] There is no question, of course, that such tailoring is an essential element of an affirmative action plan. In *Fullilove*, however, Justice [1367] Powell noted that the Supreme Court "has not required remedial plans to be limited

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(Footnote 12 Continued)

understand Justice Powell's position to be that societal discrimination can never be part of an appropriate basis for imposing such a remedy. Instead, I believe he is saying that before an entity enacts an affirmative action program, it must have a strong basis for concluding the program is necessary to correct racial imbalances directly attributable to racial discrimination, whether or not it is in part societal discrimination.

In *Wygant*, for example, a number of unexplained reasons could have accounted for the disparity between the percentage of minority teachers and the percentage of minority students in the Jackson school system. A generalized belief that some amorphous, or "societal," discrimination contributed to that disparity was insufficient to justify the School Board's affirmative action program. In *Fullilove*, however, the program constituted an appropriate remedy, in light of Congress' well-documented finding that both public and private discrimination directly contributed to the small percentage of public contracts awarded minority contractors. There, Justice Powell concurred in the Court's judgment that upheld Congress' ten-percent set-aside program for minority contractors.

[13]As an alternative basis for its holding, the majority concludes that the ordinance is not narrowly tailored to the remedial goal of eliminating discrimination. It reasons that the thirty-percent minority set aside is over-inclusive and hypothesizes that in certain contracts the thirty-percent figure would have to be adjusted

to the least restrictive means of implementation." *Fullilove*, 448 U.S. at 508, 100 S.Ct. at 2790 (Powell, J., concurring). Moreover, Justice Powell identified several considerations to guide the determination of whether the plan is sufficiently narrow, *e.g.*, the duration of the plan, the availability of waiver provisions, the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force, and the effect on innocent third parties. 448 U.S. at 510-11, 100 S.Ct. at 2791 (Powell, J., concurring). I am convinced that under these criteria the ordinance is sufficiently narrow.

The first two criteria need little discussion. The Richmond Plan is designed to last only five years. Its waiver provisions were purposefully drawn to parallel those approved in *Fullilove*. Even the majority concedes, as it must, that these factors help narrow the scope of the ordinance.

(Footnote 13 Continued)

upward. These conclusions of the majority lack evidentiary support; to use a phrase coined by the majority, they "emerge[ ] from the mists."

In their opinions in *Wygant*, both Justices Powell and O'Connor reaffirmed the principle that the plaintiff bears the overall burden of providing the constitutional invalidity of an affirmative action plan. *Wygant*, 106 S.Ct. at 1848 (plurality opinion); *id.* at 1856 (O'Connor, J., concurring). In the present case, the plaintiff presented no evidence to the trial court to suggest that the thirty-percent set aside was over-broad. The majority's finding of over-inclusiveness, therefore, suffers from the same lack of a "firm basis" that it erroneously imputes to the Council.

The third criterion identified by Justice Powell requires a more detailed analysis. It must be conceded that a set-aside plan limited to the current percentage of minority contractors would not eliminate the present low level of minority participation in government contracting. In remedying the effects of discrimination, a program obviously must set aside much more than two-thirds of one percent of subcontract work if it is to encourage minorities to enter the contracting industry and encourage existing minority contractors to grow.[14] *See Fullilove,* 448 U.S. at 513-14, 100 S.Ct. at 2792-93 (Powell, J., concurring) (10% set-aside acceptable, where 17% of the population and only 4% of the contractors were minority group members); *Schmidt v. Oakland Unified School Dist.,* 662 F.2d 550, 559 (9th Cir.1981), *vacated on other grounds,* 457 U.S. 594, 102 S.Ct. 2612, 73 L.Ed.2d 245 (1982) (25% goal acceptable in light of city's 34.5% non-white population; decision vacated for failure to reach merits of state statutory issue prior to deciding constitutional claim); *Southwest Washington Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County,*

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[14]The Supreme Court most recently approved a similar approach in *United States v. Paradise,* ___ U.S. ___, 107 S.Ct. 1053, 94 L.Ed.2d 203 (U.S.1987) where the evidence demonstrated that the Alabama Department of Public Safety steadfastly had resisted the promotion of black troopers. *See also Johnson v. Santa Clara County,* ___ U.S. ___, 107 S.Ct. 1442, 94 L.Ed.2d 615 (U.S.1987); *Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC,* ___ U.S. ___, 106 S.Ct. 3019, 3050-51, 92 L.Ed.2d 344 (1986). Although approaching the problem in a different procedural context, the decision in *Paradise* demonstrated the propriety of a temporarily imposed overrepresentation to meet a long-range goal. After considerable litigation, the district court ruled that fifty percent of all promotions from trooper to corporal must be from a labor pool consisting of black troopers, even though that pool

100 Wash.2d 109, 667 P.2d 1092, 1101 (1983) (MBE participation goal of 11% set at slightly less than county's minority population held acceptable). Common sense dictates that judging the set-aside percentage by referring to the small proportion of existing MBEs in the economy would perpetuate rather than alleviate past discrimination.

As to Justice Powell's last suggested criterion, *i.e.*, the effect on innocent third parties—the favoring of a percentage of [1368] minority contractors will, of course,

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(Footnote 14 Continued)

consisted of only twenty-five percent of the total trooper pool. Responding to the Department's argument that this exceeded a statistical balance by twice, the Court said:

> The Government suggests that the one-for-one requirement is arbitrary because it bears no relationship to the 25% minority labor pool relevant here. This argument ignores that the 50% figure is not itself the goal; rather it presents the speed at which the goal of 25% will be achieved. The interim requirement of one-for-one promotion . . . would simply have determined how quickly the Department progressed toward this ultimate goal.
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> * * *
>
> Although the appropriate ratio here "necessarily involve[d] a degree of approximation and imprecision," *Teamsters v. United States*, 431 U.S. 324, 372 [97 S.Ct. 1843, 1873, 52 L.Ed.2d 396] (1977), the District Court, with its first-hand experience of the parties and the potential for resistance, imposed the requirement that it determined would compensate for past delay and prevent future recalcitrance, while not unduly burdening the interests of white troopers.

Paradise, ____ U.S. at ____, 107 S.Ct. at 1070 (footnote omitted).

disfavor a percentage of nonminority contractors. That is the negative side of the necessary balancing in any affirmative action program: "innocent persons may be called upon to bear some of the burden" of remedying the effects of discrimination. *Wygant*, 106 S.Ct. at 1850 (plurality opinion). Here, however, as with *hirings* in employment cases (as opposed to *layoffs*), the result is not to deprive a nonminority member of something already possessed but to limit temporarily a future opportunity. This distinction has been noted with approval in a number of Supreme Court cases. In *Wygant*, for example, Justice Powell said:

> In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.

106 S.Ct. at 1851 (plurality opinion) (emphasis in original). The ordinance is narrowly drawn; it satisfies all of the *Fullilove* criteria.

For all these reasons, I would affirm the judgment of the district court.

"EXCERPTS FROM DOT (UMTA) CIRCULAR C 1165-1 (DECEMBER 30, 1977)"

Adequate planning is critical to insuring that MBEs have an equitable opportunity to compete for contracts and subcontracts. The applicant should begin this planning by reviewing and evaluating its transportation improvement program to identify those procurement activities which have the greatest potential for MBE participation. Once these have been identified, goals should be set which are practical and related to the availability of minority firms in desired areas of expertise. Goals provide a benchmark for achievement of the MBE program within a specified time frame.

UMTA does not prescribe a methodology that must be followed in setting goals, thereby allowing for flexibility depending on local circumstances. There are several factors, however, which contribute to successful goal setting:

— Goals should be based on projections of contract awards.

— Goals should reflect the full range of proposed procurement activity and should not be confined to only one area, such as construction.

— Goals should reflect the full range of proposed procurement activity and should not be confined to only one area, such as construction.

- Achievement of specified MBE subcontract goals or adequate documentation and justification of failure to meet the goals must be required of prime contractors.

- Goals should be related to the availability of MBEs.

- Other local MBE goals should be taken into consideration.

The setting of goals is an attempt to match projected procurements with available, qualified MBEs. An MBE is unavailable to perform if it has the knowledge of the terms and specifications of the contract needed to formulate intelligently a proposal for such work or to decline intelligently an opportunity to formulate such a proposal and it does not intend, or is unable, to make a proposal because of lack of interest, inability to meet the reasonable and ordinary demands connected with doing such work, unwillingness to meet the specifications for such work, unwillingness to work on this project or in this geographic area, or such other reason as is determined by the applicant to be sufficient.

The geographic basis for assessing MBE availability will vary with the type of procurement. For example, availability for printers may be confined to the local metropolitan area due to logistics of timely completion of work orders. On the other hand, the availability of A&E firms might be determined on a national basis, since these firms are more mobile. In general, in defining the geographical boundaries for determining the availability of MBEs in specific trades or professions,

the applicant should follow a common sense approach and the customs that the applicant have applied to non-minority firms.

It should be kept in mind that, if the data collected to develop goals, particularly MBE availability, is inadequate or is assessed in a superficial manner, UMTA may find the goals unacceptable.

Goals should be reviewed at least annually. The review process should analyze the projected versus the actual MBE participation during the previous year. The necessary revisions should be made based on the analysis and submitted to UMTA. Goals, and a description of the methodology used in establishing them, must be submitted to UMTA with each project application.